*Together with Case No. 192, Goltra v. United States.

CLERK'S COPY.

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 191

THE UNITED STATES, APPELLANT

vs.

KATE B. GOLTRA AND E. FIELD GOLTRA, JR., EXECUTORS OF THE ESTATE OF EDWARD F. GOLTRA, DECEASED

No. 192

KATE B. GOLTRA AND E. FIELD GOLTRA, JR., EXECUTORS OF THE ESTATE OF EDWARD F. GOLTRA, DECEASED, APPELLANTS

vs.

THE UNITED STATES

APPEALS FROM THE COURT OF CLAIMS

FILED JUNE 29, 1940

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INDEX

	Original	Print
Record from Court of Claims	1	1
Petition	1	1
Exhibit A—Private act No. 69—73d Congress	23	14
Exhibit B—Original contract, May 28, 1919	24	15
Exhibit C—Supplemental contract, May 27, 1921	34	21
General traverse	37	23
Special answer	37	23
Counterclaim	41	25
Second counterclaim	43	26
Answer to second counterclaim	47	27
Suggestion of death of plaintiff and motion to substitute executors	50	28
Argument and submission of case	50	28
Special findings of fact	51	29
Conclusion of law	75	49

Record from Court of Claims—Continued.	Original	Print
Opinion of the court by Whaley, Ch. J.	75	49
Judgment	83	56
Petition for appeal to the Supreme Court of the United States	84	56
Assignment of errors	85	57
Order allowing appeal to the Supreme Court of the United States	128	57
Citation and service [omitted in printing]	131	58
Defendant's request for transcript of record	133	58
Plaintiff's petition for cross-appeal to Supreme Court of the United States	134	58
Assignment of errors	136	59
Order allowing cross-appeal to the Supreme Court of the United States	145	62
Plaintiff's citation and service [omitted in printing]	148	63
Plaintiff's request for portions of record	150	63
Clerk's certificate [omitted in printing]	156	66
Stipulation as to record on cross-appeal and petition for certiorari by plaintiffs	158	66
Plaintiff's exhibit No. 142—Affidavit of John R. Dillon	172	76
Exhibit A—Table of financing of maritime and shipping issues, 1925–1927	179	80
Exhibit B—Same, 1928–1931	180	91
Exhibit C—Compilation of interest rates in "27 Southern and Western Cities"	181	82
Defendant's exhibit A–36—Compilation of interest rates as compiled by Federal Reserve Board	182	82
Clerk's certificate	183	83
Statement of points relied upon and designation of record for printing—Case No. 191	184	83
Statement of points relied upon and designation of record for printing—Case No. 192	185	84

1

IN THE COURT OF CLAIMS

No. 42696

KATE B. GOLTRA AND E. FIELD GOLTRA, JR., EXECUTORS OF THE ESTATE OF EDWARD F. GOLTRA, DECEASED

v.

THE UNITED STATES

I. *Petition*

Filed July 20, 1934

To the Honorable the Chief Justice and Judges of the Court of Claims:

The plaintiff, Edward F. Goltra, respectfully represents:

FOR A FIRST CAUSE OF ACTION

I. Plaintiff is and was during all of the times of the occurrences hereinafter mentioned a citizen of the United States and a resident of the City of St. Louis, State of Missouri, and his post office address then and now is 4487 Lindell Boulevard, St. Louis, Missouri.

II. This petition is filed pursuant to Private Act No. 69, enacted at the Second Session of the Seventy-third Congress of the United States and approved by the President April 18, 1934, a copy of which is annexed hereto marked "Exhibit A" and made a part hereof.

III. On or about May 28, 1919, plaintiff entered into a contract with the United States, hereinafter referred to as the "original contract" a copy of which is annexed hereto marked "Exhibit B" and made a part hereof.

2 IV. By said original contract the United States agreed to and did lease to plaintiff nineteen (19) barges and three (3) or four (4) towboats for the term of five years beginning with the date of delivery of the first barge or towboat, and plaintiff agreed among other things to operate said barges and towboats as a common carrier upon the Mississippi River and its tributaries for the period of the lease, transporting iron ore, coal, and other commodities, at rates not in excess of the prevailing rail tariffs, and not less than the prevailing rail tariffs without the consent of the Secretary of War, and it was understood and agreed that the Secretary of War would fix rates substantially lower than the rail tariffs so plaintiff could obtain business and

profitably operate said barges and towboats. Said original contract also provided that plaintiff should pay all operating expenses of said barges and towboats, maintain said barges and towboats in good condition, hold the United States free from liability in connection with said barges and towboats, discharge all liens against any of said barges and towboats, procure certain insurance and furnish certain bonds for the protection of the United States, and keep accurate detailed accounts of the business of said barges and towboats. Said original contract also contained the following provisions:

"3. The net earnings above operating expenses and maintenance for each and every ton of cargo moved and all other net earnings shall be turned over by the lessee to the Secretary of War as soon as practicable after each proper determination of the amount thereof but at least every ninety days, for deposit with the Treasurer of the United States to the credit of the Secretary of War in a special deposit account and shall continue so to be turned over to him and so deposited by him until such time as
3 said net earnings shall equal the full amount of the cost of the several vessels of the fleet plus interest on said cost at 4 percent. per annum computed from the respective dates of delivery of the several vessels of the fleet and that thereafter all net earnings over and above the full amount of the said cost of the several vessels of the fleet, plus interest on said cost at 4 per cent per annum, shall be deposited to the credit of the Secretary of War at least every ninety days by the lessee in one or more national banks in St. Louis, Missouri, to be designated by the lessor, to be held for the fulfillment of the terms of this lease, provided that earnings derived from the transportation of commodities in barges hereby leased, moved by towboats not furnished by the United States, shall until all vessels of the government fleet are delivered to the lessee, be subject to deduction of cost of the hire of the necessary towboats to move said barges, in addition to any other operating expenses and maintenance in connection therewith.

* * * * *

"5. Within three months prior to the expiration of the lease, or of any period of renewal, or sooner if so desired by the lessee, a board of three persons shall be appointed, one to be designated by the lessor, one by the lessee and one by the said two members unless they shall fail to agree, in which case the third member shall be appointed by the Secretary of War, all of whom shall be familiar with the construction and cost of river vessels of steel and with the current market values thereof, to appraise the

value of the said fleet at that time, and the said lessee shall be given the option of purchasing the fleet upon the following terms:

"(a) If the funds turned over to the Secretary of War and deposited by him with the Treasurer of the United States, under section 3 of this lease, shall aggregate a sum equal to the full amount of the cost of the several vessels of the fleet, plus
4 interest on said cost at 4 per cent per annum as aforesaid, then in case of the exercise of said option by the lessee said funds shall be applied to payment in full for the fleet, and any net earnings over and above the amount required for such payment on deposit in said bank or banks, provided in section 3 of the lease, or otherwise held on deposit, shall be paid to the lessee.

"(b) If the funds turned over to the Secretary of War and by him deposited with the Treasurer of the United States, under Section 3 of this lease, shall be less than the full amount of the cost, plus accrued interest at the rate of 4 percent per annum on such cost, but greater than the appraised value, the funds shall in said event be applied to payment of the fleet at the appraised value, and any amount in excess of the appraised value shall be retained by the Secretary of War for the use and benefit of the United States; and the fleet shall thereupon become the property of the lessee.

"(c) If the funds turned over to the Secretary of War and by him deposited with the Treasurer of the United States, as provided by section 3 of this lease, shall be less than the appraised value, then in the event aforesaid such funds shall be applied to the payment of the fleet so far as they shall reach, and the lessee shall pay in addition thereto, in the manner specified in section 6 hereof, the amount whereby the aggregate funds so turned over to the Secretary of War fall short of the said appraised value.

"6. It is further covenanted and agreed that the method of payment of any amount which the purchaser shall be required to pay, and not provided for out of the sums deposited to the credit of the Secretary of War shall be as follows:

"There shall be sixteen (16) payments. The first shall coasist of all moneys on deposit to the credit of the Secretary of
5 War, as indicated above, and shall be so applied at the date of the sale. The Lessee shall execute for the balance fifteen (15) promissory notes in equal amounts, payable at the expiration of one year, two years, three years, etc., from date of sale with interest at 4 per cent per annum. Title to the property shall remain in the United States until the payment of the whole of the purchase price of said property.

"8. The lessor reserves the right to inspect the plant, fleet, and work, at any time to see that all the said terms and conditions of this lease are fulfilled, and that the crews and other employees are promptly paid, monthly or oftener; and noncompliance, in his judgment, with any of the terms or conditions will justify his terminating the lease and returning the plant and said barges and towboats to the lessor, and all moneys in the Treasury or in bank to the credit of the Secretary of War shall be deemed rentals earned by and due to the lessor for the use of said vessels." The Chief of Engineers of the United States Army was the person designated and referred to in said original contract as the "lessor."

V. On or about May 27, 1921, plaintiff entered into a supplemental contract with the United States, hereinafter referred to as the "supplemental contract," a copy of which is annexed hereto marked "Exhibit C" and made a part hereof.

VI. Said supplemental contract supplemented and modified said original contract so as more fully to provide for the operation by plaintiff of said barges and towboats as a common carrier as aforesaid by providing unloading facilities at St.
6 Louis, Missouri, and providing for the sale of such facilities to plaintiff under certain conditions. By said supplemental contract the United States agreed to erect, on a tract of land and runway to be provided by plaintiff, unloading facilities for the use of said barges and towboats, and plaintiff agreed at his own expense within eight months to provide the necessary land and runway on which said unloading facilities were to be erected and stand. Said supplemental contract also provided that plaintiff should maintain and operate said unloading facilities in connection with said barges and towboats as a common carrier; that plaintiff should procure certain insurance for the benefit of the United States; that the terms of the original contract as to net earnings, appraisement, option to purchase, conditions of purchase and inspection, should govern, as far as applicable to said unloading facilities; and that in case plaintiff should not take over and pay for said unloading facilities the lessor might remove the same or lease the land and runway on which they stand for five years with privilege of renewals, the terms if not mutually agreed upon by the lessor and plaintiff to be fixed by a board of three persons, one member to be selected by the lessor, one by the plaintiff, and one by the two aforesaid members. The Chief of Engineers of the United States Army was the person designated and referred to in said supplemental contract as the "lessor."

VII. In 1920 the United States acting by and through the Secretary of War and subordinate officers and agents of the War

Department, began the transportation of commodities as a common carrier upon the Mississippi River and its tributaries by means of a fleet of barges and towboats owned and operated by it, known as the "Mississippi Warrior Service." Said Mississippi Warrior Service was authorized and permitted by defendant to carry all commodities at rates of 80 percent of the all-rail rates.

7

VIII. In March, 1921, in anticipation of the delivery to him of said barges and towboats and in order to be able to solicit business therefor and answer numerous inquiries from river cities and others as to what his rates for transportation would be, plaintiff requested that his rates be fixed at 80 per cent of the all rail rates, which was the basis of the rates then being charged by the United States itself for transportation by said Mississippi Warrior Service, and the Secretary of War of the United States, thereupon fixed plaintiff's rates at 80 per cent of the all rail rates. This difference of rates between the all rail rates and the barge rates at which plaintiff by virtue of his contract should operate was very important to plaintiff in obtaining business as shippers could have their goods transported by railroad much more rapidly than by river transportation and they had long been accustomed to transporting their goods by railroad, and the 20% lower rates would serve as an inducement to persuade them to discontinue their transportation by railroad and change their mode of shipment to river transportation.

IX. In reliance upon the action of the Secretary of War in fixing plaintiff's rates as alleged in Paragraph VIII hereof, plaintiff held himself out to the public as being ready, willing and able to transport commodities at such rates when said barges and tow boats should be delivered to him, and solicited, negotiated for securing from numerous shippers, and obtained several commitments for, transportation at said rates of grains, oil,

8

coal, manganese ore and other commodities, and prepared to carry on such transportation when said barges and towboats should be delivered to him, and did numerous other acts preparatory to and in reliance upon the exercise of his right to operate said barges and towboats as a common carrier upon the Mississippi River and its tributaries at such rates.

X. Over a year after the Secretary of War had fixed plaintiff's rates as alleged in Paragraph VIII hereof and with knowledge of the facts alleged in Paragraphs VII, VIII and IX hereof, the Secretary of War of the United States notified plaintiff that plaintiff would not be permitted to operate said barges and towboats on the Mississippi River and its tributaries below St. Louis in competition with said Mississippi Warrior Service, that plaintiff's right to operate said barges and towboats at 80%

of the all rail rates on the Mississippi River and its tributaries below St. Louis was cancelled, that plaintiff was authorized to operate said barge and towboats on the Mississippi River and its tributaries below St. Louis only at rates not less than the all rail rates except in such cases and as to such transactions and commodities as the Secretary of War should, on application to him, have previously specifically consented to and approved, and that plaintiff was authorized to transport on the Mississippi River and its tributaries below St. Louis at 80% of the all rail rates certain specified commodities for the transportation of many of which there was no great demand, but that he would be permitted to transport grain, for the transportation of which there was great demand, on the Mississippi River and its tributaries below St. Louis only in so far as it was available over and above
9 the capacity of the Mississippi Warrior Service to handle such commodity and only in such amounts and on such dates as said Mississippi Warrior Service would determine. At the same time the Secretary of War or another officer of the United States, caused the widespread circulation in St. Louis and elsewhere in the Mississippi River Valley of rumors and reports that plaintiff's right to operate said barges and towboats as a common carrier was subject to the restrictions which the Secretary of War had attempted to place thereon as hereinbefore alleged, that plaintiff was not performing his obligation to operate said barges and towboats as a common carrier and was in default under his contract, and that it was probable that said contract would be terminated and said barges and towboats taken from plaintiff. The Secretary of War and other officers of defendant then well knew plaintiff would be greatly limited and restricted in establishing public confidence in or getting business for said barges and towboats under such restrictions and against the competition of said Mississippi Warrior Service which continued to operate at rates of 80% of the all rail rates. The foregoing acts impaired the confidence of the public in plaintiff's operation of said barges and towboats as a common carrier and prevented many shippers from dealing with plaintiff and were designed and committed for the purpose of preventing plaintiff from competing with said Mississippi Warrior Service and putting him ostensibly in default in the performance of his obligations under said original and supplementary contracts and thereby eventually securing said barges and towboats for said Mississippi Warrior Service.

XI. On or about July 15, 1922, plaintiff duly delivered
10 to the United States the insurance and bonds required to be furnished under said original contract and said barges and towboats were delivered to him.

XII. Until said barges and towboats were placed into winter quarters as hereinafter alleged plaintiff operated them as a common carrier in accordance with said original contract to the extent to which it was possible to so operate them, and was prevented from operating them to a greater extent by the following circumstances:

(1) At the time when they were delivered to plaintiff said barges and towboats were incomplete or defective and were not fit or ready for the purposes contemplated in said original contract and consequently plaintiff had to lay them up for some time and test said towboats and expend considerable money on them for necessary alterations and repairs in order that they could be used for such purposes and was therefore delayed in commencing the operation of said barges and towboats.

(2) During the navigable season of 1922 the water in the Mississippi River and its tributaries was exceedingly low and navigation in certain portions thereof where plaintiff might otherwise have operated said barges and towboats was for the greater portion of such period impossible.

(3) The acts of officers of the United States alleged in Paragraph X hereof prevented plaintiff from obtaining business which he could otherwise have obtained.

XIII. Navigation was closed on the Mississippi River during the winter of 1922–1923 because of ice and low water and
11 was not reopened until about March 1923, and said barges and towboats were put into winter quarters in the latter part of November 1922, and kept there until about March 1923, with the consent of the lessor and the United States.

XIV. On or about December 13, 1922, with knowledge that said barges and towboats were in winter quarters with the consent of the lessor and the United States, the Secretary of War caused plaintiff to be notified that he would thereafter be permitted to carry grain at 80% of the all rail rates without the restrictions referred to in Paragraph X hereof.

XV. On Sunday, March 25, 1923, when plaintiff had taken said barges and towboats out of winter quarters and was getting them ready to resume operations, the United States, acting by and through one T. Q. Ashburn, a United States Army officer who was then in charge of said Mississippi Warrior Service, and other officers and agents of the United States under orders of the Acting Secretary of War, by force and arms, without the consent and against the protest of plaintiff's representatives, seized said barges and towboats and turned them over to said Mississippi Warrior Service for the use and benefit of the United States. Since the seizure of said barges and towboats, except during a

period when plaintiff was permitted to operate them under an order of court, they had been held and operated, directly or indirectly, by and for the use and benefit of the United States and plaintiff has been deprived of the possession, use and benefit thereof and has been deprived of the use and benefit of said unloading facilities in connection with the operation of said barges and towboats.

12 XVI. The lessor has never terminated said original contract or said supplemental contract, and it has never been the judgment of the lessor that plaintiff failed to comply with his obligation to operate said barges and towboats as a common carrier or that plaintiff failed to comply with any other term or condition of said original contract or said supplemental contract. During all the time that plaintiff had been in possession of said barges and towboats the special representative of the lessor whose duty it had been to superintend the performance by plaintiff of his obligations under said original and supplemental contract had been satisfied that plaintiff had duly performed all of said obligations as far as he was permitted to do so by the Secretary of War. The seizure of said barges and towboats was not based upon the exercise of judgment by the lessor or by any other officer of the United States who had authority to make such a determination that plaintiff had failed to comply with any obligation, term or condition of said original contract or said supplemental contract, but was an attempt arbitrarily and in bad faith on the part of the United States, and certain of its officers, acting for and on behalf of the United States to deprive plaintiff of the possession of and right to operate said barges and towboats and to secure them for said Mississippi Warrior Service for the use and benefit of the United States.

XVII. On or about April 27, 1923, the Chief of Engineers signed a letter purporting to terminate said original and supplemental contracts on the ground of alleged failure of plaintiff to operate said barges and towboats as a common carrier. Said letter was not written, dictated or drafted by said Chief of Engineers. It did not represent his independent judgment or

13 any decision, judgment or opinion of his on the merits of the question whether plaintiff had failed to operate said barges and towboats as a common carrier. It was presented to him late in the afternoon by a man calling himself a representative of the Department of Justice, who said that the letter was sent to the Chief of Engineers by the Secretary of War and was to be signed by the Chief of Engineers. Being unable to get into contact, personally or by telephone, with the Secretary of War the Chief of Engineers talked by telephone with the secretary of the Secretary of War and asked if it was the Secretary's order

that he should sign the letter and was told that the Secretary of War had left very positive instructions for him to sign the letter. He also called up the office of the Judge Advocate General of the Army but was unable to reach the Judge Advocate General. He then asked for the Senior Officer present who advised him that the Secretary of War's instructions that he sign the letter constituted a legal order with which he as an officer subordinate to the Secretary of War was required to comply. No time was given the Chief of Engineers for consultation because the representative from the Department of Justice was very peremptory about having the letter signed, saying that he was leaving for St. Louis that afternoon and must take the letter with him. Said letter was signed by the Chief of Engineers only because he was advised that he had to sign it. Moreover it was written more than a month after said barges and tow boats had already been seized and was procured and used by counsel for the United States appearing in various courts of the United States in an effort to justify said seizure.

14 XVIII. Prior to the seizure of said barges and towboats, in order to exercise his option under said original and supplemental contracts to purchase said barges and towboats and said unloading facilities, plaintiff designated one person familiar with the construction and cost of river vessels of steel and with the current market values thereof to act as appraiser under said contracts and requested the lessor to appoint another person to act as a second appraiser under said contracts and did all other acts if any on his part necessary to be done in order to entitle him to exercise said option, and again, in or about December, 1924, plaintiff made a similar attempt to exercise said option, but the lessor, acting in his capacity as Chief of Engineers and as the lessor under said contracts and acting for and on behalf of the United States, refused and failed, and he and his successors as Chief of Engineers and as lessor have ever since refused and failed to appoint an appraiser or to do any other act on the part of the lessor required to effect or accomplish the exercise of said option, by reason whereof plaintiff has been prevented from exercising said option.

XIX. At the time when said original and supplemental contracts were made and at all times thereafter, to the knowledge of the United States, it was and has been plaintiff's purpose to exercise his option to purchase said barges and towboats and said unloading facilities and operate the same as a common carrier and as a private carrier and also rent the same to others, and by so doing earn profits and rents, and it was contemplated by the parties to said contracts at the time when the same were made that said purpose should be effected. At the times of the acts

complained of and at all times thereafter it was and has
15 been impossible to purchase similar barges and towboats suitable for such purpose, or on such favorable terms as to payment as those contained in said original contract, and the United States knew at said times that it would be impossible to purchase similar barges and towboats suitable for such purpose or on such favorable terms.

XX. (1) When said barges and towboats were delivered to plaintiff, said towboats were incomplete and defective and it was necessary for plaintiff to make certain alterations and repairs thereon as alleged in Paragraph XII (1) hereof, and plaintiff spent for such alterations and repairs the amount of $13,061.05, which was the reasonable value and cost thereof.

(2) When said barges and towboats were returned to plaintiff temporarily under the order of court referred to in Paragraph XV hereof, it was necessary for plaintiff to make certain repairs on said towboats to repair injuries thereto caused by the acts of the United States and its officers subsequent to the seizure thereof, and plaintiff had to spend for such repairs the amount of $79,474.52, which was the reasonable value and cost thereof.

(3) When said barges and towboats were seized, plaintiff had on board one of said towboats fuel oil and other supplies, the personal property of plaintiff, for which plaintiff had paid and the reasonable value of which was $5,038.44, which the United States and its officers seized and appropriated to the use and benefit of the United States.

16 (4) In compliance with his obligations under said contracts, plaintiff furnished certain insurance and bonds for which he had to spend $52,845.03, which was the reasonable value and cost thereof.

XXI. As hereinabove shown, the United States violated and failed and refused to perform the terms and conditions of said original and supplemental contracts on its part to be performed and interfered with and prevented complete performance by plaintiff of the terms and conditions of said contracts on his part to be performed and said barges and towboats were taken from plaintiff by the United States under orders of the Acting Secretary of War for the use and benefit of the United States.

XXII. Plaintiff has ever been ready, willing, and able to perform the terms and conditions of said original and supplemental contracts on his part to be performed. During the time when he had possession of said barges and towboats plaintiff duly performed his obligations under said original contract to operate said barges and towboats as a common carrier, to pay operating expenses, to maintain said barges and towboats in good condition, to hold the United States free from liability, to discharge

liens, to procure insurance and bonds, to keep accurate detailed accounts, to turn over and deposit net earnings, and all the terms and conditions necessary to be performed by him to exercise his option to purchase said barges and towboats and entitle him to an appraisal and transfer of title to the same, and all the other terms and conditions, if any, of said original contract on his part to be performed, and his obligations under said supplemental contract, within eight months after the date thereof to provide the necessary land and runway for said unload-
17 ing facilities, to provide insurance for the benefit of the United States, to maintain and operate said unloading facilities in connection with said barges and towboats as a common carrier, and all the terms and conditions necessary to be performed by him to exercise his option to purchase said unloading facilities and entitle him to an appraisal and transfer of title to the same, and all the other terms and conditions, if any, of said supplemental contract on his part to be performed—except in so far as he was prevented and excused from such performance by the circumstances and the wrongful acts of the United States and certain of its officers and agents hereinabove alleged, but for which he would have fully performed all of said terms and conditions.

XXIII. By reason of the acts herein complained of, plaintiff has suffered loss and damage in connection with said barges and towboats as follows:

(1) Plaintiff was deprived of the benefit of said original and supplemental contracts.

(2) Plaintiff was deprived of the benefit of his equitable interest in said barges and towboats and said unloading facilities.

(3) Plaintiff was deprived of the benefit of his option to purchase said barges and towboats and said unloading facilities.

(4) Plaintiff was deprived of the opportunity to make profits which he could have made with said barges and towboats and said unloading facilities but for said acts.

(5) Plaintiff was deprived of the value of the use of said barges and towboats and said unloading facilities during the period in which he was deprived of the possession of said barges and towboats.

18 (6) Plaintiff spent $13,061.05 for alterations and repairs as alleged in Paragraph XX (1) hereof.

(7) Plaintiff spent $79,474.52 for repairs as alleged in Paragraph XX (2) hereof.

(8) Plaintiff spent $5,038.44 for fuel oil and other supplies as alleged in Paragraph XX (3) hereof.

(9) Plaintiff spent $52,845.03 for insurance and bonds as alleged in Paragraph XX (4) hereof.

By reason of the matters hereinabove set out in this first cause of action, plaintiff has suffered loss and damage in the sum of $10,150,419.04, which sum together with interest thereon is the just compensation to which plaintiff is entitled for such losses and damage so suffered by plaintiff.

XXIV. Plaintiff believes the facts stated in this cause of action to be true. No action has been taken on this claim in any of the departments, other than as above set out, and no action has been taken thereon in Congress except in connection with the enactment of Private Act No. 69 referred to in Paragraph II hereof; there is not now pending any suit or process in any court on the aforementioned matters; no person other than plaintiff is the owner thereof or interested therein; no assignment or transfer of said claim or of any part thereof or of interest therein has been made; plaintiff has not been paid the amounts herein claimed or any part thereof and is justly entitled to the amounts herein claimed from the United States after allowing all just credits and offsets; plaintiff has at all times borne true allegiance to the Government of the United States and has not in any way voluntarily aided, abetted or given encouragement to rebellion against said Government.

19 FOR A SECOND CAUSE OF ACTION

XXV. Plaintiff repeats and realleges each and every allegation contained in Paragraphs I to XIX and XXI and XXII hereof inclusive with the same force and effect as if they were herein set forth in full.

XXVI. Plaintiff, in compliance with his obligation under said supplemental contract, provided at his own expense the necessary tract of land and runway at 6500 South Broadway, St. Louis, Missouri, on which said unloading facilities were to be erected, stand and operate and ever since that time he has been the owner in fee of said tract of land and said runway.

XXVII. The United States, in compliance with its obligations under said supplemental contract, erected said unloading facilities on said tract of land and runway and from about March 24, 1923, to about September 4, 1924, and from about July 1, 1926, to about August 31, 1930, said tract of land and runway were used and occupied by the United States for said unloading facilities and plaintiff was deprived of the use and occupation and the rental value thereof.

XXVIII. The reasonable rental value of said tract of land and runway during the time that they were used and occupied by the United States as alleged in Paragraph XXVII hereof was $50,037.73.

XXIX. During the time that said tract of land and runway were used and occupied by the United States for said unloading facilities as alleged in Paragraph XXVII hereof said unloading facilities were left by the United States in plaintiff's care and plaintiff had to employ watchmen to care for the same and had to pay said watchmen the amount of $16,841.25, which was the reasonable value of their services.

20 XXX. Said unloading facilities were and are of no value to plaintiff unless he could use the same and detract from the value of said tract of land and the reasonable expense of removing the same from said tract of land will exceed the value thereof when removed by at least $35,000.

XXXI. Plaintiff had to spend for said runway the amount of $36,061.49, which was the reasonable value and cost thereof.

XXXII. Said runway is of no value to plaintiff and detracts from the value of said tract of land and the reasonable expense of removing the same from said tract of land will exceed the value thereof when removed by at least $2,500.

XXXIII. Plaintiff was deprived of the use of said unloading facilities from about March 24, 1923, to September 4, 1924, and since July 1, 1926. The reasonable rental value and value of the use of said unloading facilities exclusive of land and runways is $25,000 per year.

XXXIV. By reason of the matters set forth in this second cause of action, plaintiff has suffered loss and damage in the sum of $377,940.47, which sum together with interest thereon is the just compensation to which plaintiff is entitled for such losses and damage so suffered by plaintiff.

XXXV. Plaintiff made claim with the War Department for reimbursement of the loss and damage which he had

21 suffered because of the acts and things alleged in this cause of action and said department failed and refused to pay the same or any part thereof.

XXXVI. Plaintiff believes the facts stated in this cause of action to be true. No action has been taken on this claim in any of the departments except as alleged in Paragraph XXXV hereof and no action has been taken thereon in Congress except in connection with the enactment of Private Act No. 69 referred to in Paragraph II hereof; there is not now pending any suit or process in any court on the aforementioned matters; no person other than plaintiff is the owner thereof or interested therein; no assignment or transfer of said claim or of any part thereof or of interest therein has been made; plaintiff has not been paid the amounts herein claimed or any part thereof and is justly entitled to the amounts herein claimed from the United States after allowing all just credits and offsets; plaintiff has at all times borne true

allegiance to the Government of the United States and has not in any way voluntarily aided, abetted, or given encouragement to rebellion against said Government.

Wherefore, plaintiff prays judgment against the United States upon the facts and the law in the amount of $10,528,359.51 with interest, together with the costs and disbursements of this action, and for such other relief as to the court may seem just.

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728 Seventeenth Street, Washington, D. C.
Of Counsel.

22 *Duly sworn to by Edward F. Goltra; jurat omitted in printing.*

23 *Exhibit A to petition*

(Private—No. 69—74th Congress)

(S. 1091)

AN ACT.

Conferring jurisdiction upon the Court of Claims of the United States to hear, consider, and render judgment on the claims of Edward F. Goltra against the United States arising out of the taking of certain vessels and unloading apparatus.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That jurisdiction is hereby conferred upon the Court of Claims of the United States, whose duty it shall be, notwithstanding the lapse of time or the bar of any statute of limitations or previous court decisions, to hear, consider, and render judgment on the claims of Edward F. Goltra against the United States for just compensation to him for certain vessels and unloading apparatus taken, whereby tortiously or not, on March 25, 1923, by the United States under orders of the Acting Secretary of War, for the use and benefit of the United States; and any other legal or equitable claims arising out of the transactions in connection therewith: Provided, That separate suits may be brought with respect to the vessels and the unloading apparatus, but no suit shall be brought after the expiration of one year from the effective date of this Act: Provided further, That either party may appeal as of right to the Supreme Court of the United States

from any judgment in said case at any time within ninety days after the rendition thereof, and any judgment rendered in favor of the claimant shall be paid in the same manner as other judgments of said Court of Claims are paid.

Approved, April 18, 1934.

24 *Exhibit B to petition*

1. This lease, made this 28th day of May 1919, between the United States of America, represented by Major General William M. Black, Chief of Engineers, United States Army, directed by the Secretary of War so to represent the United States, hereinafter designated as the lessor, party of the first part, and Edward F. Goltra, of the City of St. Louis, State of Missouri, hereinafter designated as the lessee, his heirs, executors and administrators, party of the second part, witnesseth, that

Whereas, the party of the second part at the request of certain government officials as an emergency of war, in order to increase the output of pig iron, made certain arrangements for iron ore and coal properties with a view to producing pig iron at St. Louis, Missouri; and

Whereas, the United States Shipping Board Emergency Fleet Corporation, allotted to the Chief of Engineers the sum of $3,860,000 for the construction of a fleet of towboats and barges for the primary purpose of transporting the said iron and coal to and from St. Louis, Missouri; and

Whereas, on the first day of August 1918, the United States of America entered into contracts for the construction of nineteen barges suitable to use for the transportation of said iron ore and coal; and

Whereas, the United States of America is about to construct by contract or otherwise a fleet of towboats for the purpose of towing the said barges, the construction of which in the opinion of the Secretary of War is necessary to enable the government to dispose of the said barges more advantageously; and

25 Whereas, the said fleet of towboats and barges is especially designed for and adapted to the transportation of iron ore and coal; and

Whereas, the said lessee has entered into various engagements and undertakings to increase the pig iron supply as a war measure, which may have created, and according to the contention of the lessee did create obligations on the part of the United States to the said lessee, but which he entirely releases and discharges in part consideration of this lease, which engagements, undertakings, and lease are in furtherance of the original design

for the assembling of coal and iron ore at St. Louis, Missouri, and for the increase of pig iron facilities;

Now, therefore, the said lessor doth hereby charter and lease unto the said lessee for a term of five (5) years, beginning with the date of delivery to the lessee of the first barge or towboat and terminating five (5) years after the delivery of the first barge or towboat the following described property, viz:

Nineteen barges which are being constructed under contracts dated August 1, 1918, with the Marietta Manufacturing Company, of Point Pleasant, W. Va., the Dravo Contracting Company, of Pittsburgh, Pa., and the Dubuque Boat & Boiler Works, of Dubuque, Ia., and three or four towboats about to be constructed and described in accordance with specifications prepared or to be prepared therefor.

It is thereupon covenanted and agreed between the said parties as follows:

2. (a) That the said lessee shall operate as a common carrier the said fleet of three or four towboats and nineteen barges upon the Mississippi River and its tributaries for the period of the lease and of any renewals thereof, transporting iron ore,
26 coal and other commodities at rates not in excess of the prevailing rail tariffs, and not less than the prevailing rail tariffs without the consent of the Secretary of War; but nothing herein shall be deemed to prevent the most profitable and most advantageous use of said vessels being made provided the Secretary of War consents to such use other than as a common carrier.

(b) That the lessee shall pay all operating expenses of the fleet and maintain, during the continuance of the lease, each towboat and barge of the fleet in good operating condition to the satisfaction of the lessor; and shall hold the United States entirely free from all liabilities and indebtedness of every kind in connection with the operation, care, and maintenance of the entire fleet and all its engines, boilers, outfit, tackle, apparel, furniture, and appurtenances; and the lessee shall, without unnecessary delay, as soon as he acquires any knowledge thereof, discharge any and all maritime liens that may at any time during the continuance of this lease from any cause arise against or become impressed upon any one, any, or all of the fleet of nineteen barges and three or four towboats. The lessee shall procure and take out for the benefit of the United States, insurance, both fire and marine, in such an amount as in the judgment of the Secretary of War each of the vessels may require and with such underwriters or in such companies as are approved by the lessor, insuring each and every one of the barges and towboats against physical injury to them, or any of them, and against the loss

of any or all of the barges and towboats hereby leased. The lessee shall likewise procure and take out fire, marine, and towers liability insurance in such an amount as in the judgment of the Secretary of War each of the vessels may require with such underwriters or in such companies as shall be approved
27 by the lessor, and for the benefit of the United States, insuring each of the vessels against such injury as may be inflicted by such vessel upon other property, such as might result in maritime liens, or in liability or obligation by the lessor and, if the lessor shall require, execute and deliver to the lessor, a bond in the penal sum of Three Hundred Thousand ($300,000.00) Dollars, conditioned to protect the United States against such liability or obligation and against any and all maritime or other liens against the fleet or any of the vessels of the fleet and against any and all depreciation in value of all or any of said vessels, by reason of maritime or other liens arising or becoming impressed upon them or any of them. Such bonds as in any part of this contract are required to be given by the lessee for the benefit of the United States shall always and at all times during the continuance of this lease be kept good and shall be replaced at any time by other good and sufficient bonds at the request of the lessor, and they shall be kept good not only against the impaired credit or financial responsibility of the obligor or surety, but also against partial depletion or entire exhaustion thereof brought about by the payment of losses or indemnities thereunder.

(b–1) All salvage earned, to which any of the said fleet shall become entitled, shall be for the benefit of the United States, after deducting all expenses incident thereto and the proportion due to the master, officers and crew.

(c) For the protection of persons furnishing materials, services and labor in connection with the operation, furnishing, repair care and maintenance of the said towboats and barges, the lessee shall furnish to the lessor and continue in effect during the period of the lease, and in case of sale until title passes to the pur-
28 chaser, a good and sufficient bond, approved by the lessor, in the penal sum of two hundred thousand ($200,000) dollars.

3. The net earnings above operating expenses and maintenance for each and every ton of cargo moved and all other net earnings shall be turned over by the lessee to the Secretary of War as soon as practicable after each proper determination of the amount thereof but at least every ninety days, for deposit with the Treasurer of the United States to the credit of the Secretary of War in a special deposit account and shall continue so to be turned over to him and so deposited by him until such time as said net earnings

shall equal the full amount of the cost of the several vessels of the fleet plus interest on said cost at 4 per cent per annum computed from the respective dates of delivery of the several vessels of the fleet and that thereafter all net earnings over and above the full amount of the said cost of the several vessels of the fleet, plus interest on said cost at 4 per cent per annum, shall be deposited to the credit of the Secretary of War at least every ninety days by the lessee in one or more national banks in St. Louis, Missouri, to be designated by the lessor, to be held for the fulfillment of the terms of this lease, provided that earnings derived from the transportation of commodities in barges hereby leased, moved by towboats not furnished by the United States, shall until all vessels of the government fleet are delivered to the lessee, be subject to deduction of cost of the hire of the necessary towboats to move said barges, in addition to any other operating expenses and maintenance in connection therewith.

The lessee shall keep accurate detailed accounts of all
29 tonnage moved and of all moneys received and due, and of all items of operating costs, and his accounts shall at all times be subject to inspection by the lessor, or his representatives. The overhead expenses included in operating costs shall be subject to the approval of the lessor and any items not approved by him and to which the lessee may object or take exception shall be referred to the Secretary of War, whose decision shall be final.

4. The approved national banks shall be required to furnish good and sufficient bonds, approved by the lessor, in penal sum in amounts at least equal to the sum deposited conditioned for the safety of the funds held on deposit, as provided in this lease, said bonds to be delivered to the custody of the lessor and to be maintained during the period of the deposit. The said banks shall credit to the account interest at the local prevailing rates of non-checking accounts.

5. Within three months prior to the expiration of the lease, or of any period of renewal, or sooner if so desired by the lessee, a board of three persons shall be appointed, one to be designated by the lessor, one by the lessee and one by the said two members unless they shall fail to agree, in which case the third member shall be appointed by the Secretary of War, all of whom shall be familiar with the construction and cost of river vessels of steel and with the current market values thereof, to appraise the value of the said fleet at that time, and the said lessee shall be given the option of purchasing the fleet upon the following terms:

(a) If the funds turned over to the Secretary of War and deposited by him with the Treasurer of the United States,
30 under section 3 of this lease, shall aggregate a sum equal to the full amount of the cost of the several vessels of the

fleet, plus interest on said cost at 4 per cent per annum as aforesaid, then in case of the exercise of said option by the lessee said funds shall be applied to payment in full for the fleet, and any net earnings over and above the amount required for such payment on deposit in said bank or banks, provided in section 3 of the lease, or otherwise held on deposit, shall be paid to the lessee.

(b) If the funds turned over to the Secretary of War and by him deposited with the Treasurer of the United States, under section 3 of this lease, shall be less than the full amount of the cost, plus accrued interest at the rate of 4 per cent per annum on such cost, but greater than the appraised value, the funds shall in said event be applied to payment of the fleet at the appraised value, and any amount in excess of the appraised value shall be retained by the Secretary of War for the use and benefit of the United States; and the fleet shall thereupon become the property of the lessee.

(c) If the funds turned over to the Secretary of War and by him deposited with the Treasurer of the United States, as provided by section 3 of this lease, shall be less than the appraised value, then in the event aforesaid such funds shall be applied to the payment of the fleet so far as they shall reach, and the lessee shall pay in addition thereto, in the manner specified in section 6 hereof, the amount whereby the aggregate funds so turned over to the Secretary of War fall short of the said appraised value.

6. It is further covenanted and agreed that the method of payment of any amount which the purchaser shall be required to pay, and not provided for out of the sums deposited to the credit of the Secretary of War shall be as follows:

31

There shall be sixteen (16) payments. The first shall consist of all moneys on deposit to the credit of the Secretary of War, as indicated above, and shall be so applied at the date of the sale. The Lessee shall execute for the balance fifteen (15) promissory notes, in equal amount, payable at the expiration of one year, two years, three years, etc., from date of sale with interest at 4 per cent per annum. Title to the property shall remain in the United States until the payment of the whole of the purchase price of said property.

7. It is understood and agreed that the lessee assumes full responsibility for the safety of his employees, plant and materials, and the said nineteen barges and three or four towboats, and for any damage or injury done by or to them and from any source or cause in the operation of the fleet.

8. The lessor reserves the right to inspect the plant, fleet, and work at any time to see that all the said terms and conditions

of this lease are fulfilled, and that the crews and other employees are promptly paid, monthly or oftener; and noncompliance, in his judgment, with any of the terms or conditions will justify his terminating the lease and returning the plant and said barges and towboats to the lessor, and all moneys in the Treasury or in bank to the credit of the Secretary of War shall be deemed rentals earned by and due to the lessor for the use of said vessels.

9. In the performance of the conditions of this lease, the employment of persons undergoing sentences of imprison-
32 ment at hard labor which have been imposed by courts of the several States, Territories, or municipalities having criminal jurisdiction, is prohibited.

10. No member or delegate to Congress, or resident commissioner, nor any person belonging to or employed in the military service of the United States, is or shall be admitted to any share or part of this contract, or to any benefit which may arise therefrom; but under the provisions of section 116 of the act of Congress approved March 4, 1909 (35 Stats. 1109), this stipulation, so far as it relates to members of or delegates to Congress or resident commissioners, shall not extend or be construed to extend, to any contract made with an incorporated company for its general benefit.

In witness whereof the parties aforesaid have hereunto placed their signatures the date first hereinbefore written.

JOHN STEWART, as to
Lt. Col. of Engineers.

WILLIAM M. BLACK [SEAL]
Major General,
Chief of Engineers,
U. S. Army (First Party).

———— ————, as to
Lt. Col. Engr.

EDWARD F. GOLTRA [SEAL]
(Second Party).

The insertion of the words "three or" in the thirteenth and nineteenth lines of page 2, the seventh line of page 3, and the fifteenth line of page 7 are correct and were made before the contract was completed.

WILLIAM M. BLACK,
Maj. Gen. Chief of Engr.,
First Party.

EDWARD F. GOLTRA,
Second Party.

33 It is further understood and agreed between the said William M. Black, Chief of Engineers, United States Army and Edward F. Goltra, parties of the first part and of the second part respectively of the above contract that the num-

ber of tow boats to be supplied under the above contract, denominated "three or four" therein, shall be at least three and that a fourth shall be supplied only in the event that four suitable tow boats of the general type and power described in the request for proposals now being canvassed for four tow boats for the upper Mississippi River can be obtained, with the funds available as specified in the second whereas of the above contract, and not otherwise.

WILLIAM M. BLACK.
Witness:
JOHN STEWART,
Lt. Col. of Engineers.
EDWARD F. GOLTRA.
Witness:
JAMES M. HOFFMAN,
Capt. Engrs. U. S. A.

34 *Exhibit C to petition*

WAR DEPT., ENGINEERS.
Form 19b.

Whereas, On the twenty-eighth day of May 1919, a contract was entered into between Major General W. M. Black, Chief of Engineers, U. S. Army, who, as well as his legally appointed successor, is hereinafter designated as the lessor, representing the United States of America, of the first part, and Edward F. Goltra, of the City of St. Louis, State of Missouri, his heirs, executors, administrators, or assigns, hereinafter designated as the lessee, of the second part, for chartering and leasing unto the lessee for a term of five years, subject to renewals, nineteen (19) barges and four (4) tow boats, belonging to the United States.

And whereas, it is found advantageous and in the best interest of the United States to modify the said contract as hereinafter specified, for the following reasons:

To more fully provide for the operation of the said barges and towboats as a common carrier by providing unloading facilities at St. Louis, Mo., by the use of funds remaining from the allotment of $3,860,000.00 from the United States Shipping Board Emergency Fleet Corporation, and to provide for the sale of the said unloading facilities to the lessee under certain conditions.

Now, therefore, The said contract is, by this Supplemental Agreement between Major General Lansing H. Beach, Chief of Engineers, U. S. Army, and the said contractor, on this 26th day

of May, 1921, hereby modified in the following particulars, but in no others :

35 The lessee will, at his own expense, within eight (8) months from the date hereof, provide the necessary tract of land and run-way on which the said unloading facilities are to be erected, stand and operate, said tract to be selected by the lessor, subject to approval by the lessee, and said run-way to be built according to plans submitted by lessee and approved by the lessor.

The lessor will erect on the said tract of land an unloading apparatus or facilities of a kind and character mutually agreed to by lessor and lessee as sufficient and adequate to handle the cargoes to be transported by the said barges and towboats.

The said lessee shall, at his expense, maintain and operate the said unloading facilities in connection with the barges and towboats as a common carrier, subject to such charges for services of loading and unloading as may be approved by the Secretary of War.

The said lessee shall take out and maintain for the benefit of the United States insurance in such amount and with such companies as may be approved by the lessor.

The terms of the original lease as to net earnings (paragraph 3) appraisement and option to purchase, and conditions of purchase (paragraph 5), method of payment in the event of purchase (paragraph 6), inspection (paragraph 8) shall govern so far as applicable and pertinent to the said unloading facilities.

In case the said lessee, his heirs, administrators, executors, or assigns, does not take over and pay for the said unloading facilities according to the aforesaid terms, then and in that case

36 the lessor may, without let or hindrance by the said lessee, his heirs, administrators, executors or assigns, take said unloading facilities in the same manner as is provided in the original lease as to the barges and towboats, or

In case the lessor does not desire to remove the said unloading facilities under the preceding paragraph, the lessor shall have the right to lease the land and runways on which the unloading facilities stand, for five (5) years with the privilege of renewals, the terms of such lease, if not mutually agreed to by the lessor and lessee, to be fixed by a board of three persons, one member to be selected by the lessor, one member by the lessee, and one member by agreement between the two aforesaid members.

This supplemental agreement shall be subject to the approval of the Secretary of War.

In witness whereof the parties aforesaid have hereunto placed their signatures at the time of execution of this agreement.

Witnesses:

P. J. DEMPSEY as to LANSING H. BEACH,
Major General, Chief of Engineers.

THOMAS M. ROBINS as to EDWARD F. GOLTRA,
Major, Corps of Engineers.

(Executed in Triplicate)

Approved May 27, 1921.

J. M. WAINWRIGHT,
Assistant Secretary of War.

37 II. *General traverse*

Filed August 29, 1934

And now comes the Attorney General, on behalf of the United States, and answering the petition of the claimant herein, denies each and every allegation therein contained; and asks judgment that the petition be dismissed.

GEO. C. SWEENEY,
Assistant Attorney General.

III. *Special answer*

Filed April 5, 1937, by leave of court

Comes now the defendant, by James W. Morris, Esq., Assistant Attorney General, and for cause of filing this Special Answer states that the defendant reaffirming its general traverse to the petition denies each and every allegation of the petition therein alleged and by way of special defense to the second cause of action alleged in said petition states—

I

The defendant alleges on information and belief that the plaintiff is not the owner of and does not have valid title to the property referred to in paragraph XXVI of the petition, and that he was not such owner and did not have such title at any of the times referred to in the petition.

38 The defendant further alleges on information and belief that the original Western Bank of the Mississippi River was on the Eastern edge of Front or Water Street, which said Front or Water Street is the eastern boundary of Block 2977 of the present City of St. Louis.

That the original Town of Carondelet was surveyed and laid out in 1832, and said survey shows lots and blocks on record in Plat Book No. 2, page 68, of the land records of the City of St. Louis, Missouri, showing on said plat a tow path or Water Street about 70 feet, English measure, and that said tow path or Water Street was immediately east of said original survey and plat of Blocks 11, 12, 13, 14, and 15, and that there was no individual riparian ownership on said river bank, the nearest riparian ownership to said river bank being on the west side of the tow path or Water Street; that the numberings of the original blocks as set out on the survey above referred to has since been changed and names of original streets are different, and what was originally known as L Street or Lafayette Street is now Soper Street, and what was originally Block 13 of the Town of Carondelet is now Block 2977 of the City of St. Louis. Since the filing of the original plat of the Town of Carondelet, as above referred to, due to accretions, both natural and artificial, the West bank of the Mississippi River is now approximately 535 feet east of the said original "a tow or Water Street or Front Street,"
39 which has never been platted nor dedicated and has never been assessed by the Taxing Authorities for the State, County, City, or other Municipal purposes, and the title to said accretions has never been divested out of the State nor any Municipal subdivision thereof. That said petitioner is claiming title to said accretions by virtue of a quitclaim deed executed to him in 1921 from the owner of a plot of ground beginning at the southeast corner of Block 2977 and running northeast 70 feet, thence northwest 122 feet 11 inches, thence southwest 70 feet, thence southeast 122 feet 11 inches, to point of beginning, containing a tract of land 70 feet by 122 feet 11 inches. That the title to said accretions claimed by said petitioner are on the east side of Front or Water Street, 70 feet wide, running southeastwardly to the West Bank of the Mississippi River. That said accretions are the property referred to in paragraph XXVI of the petition.

That there are several claimants to said land described in said quitclaim deed of the petitioner and that F. G. Thurman has been in possession of part of said land under color of deed since January, 1924, and that, on information and belief, he and those under whom he claims have been in possession of part of said lands claiming title for more than twenty years.

II

The defendant alleges that a large part from two-
40 thirds to three-fourths of the runways referred to in paragraph XXXVI of the Petition have been erected on the

land owned by the Mississippi Valley Iron Company, a corporation.

Wherefore, defendant prays that petitioner's second cause of action be dismissed.

W. W. SCOTT,
Acting Head, Claims Division.

SAM M. WASSELL,
ALEXANDER HOLTZOFF,
Attorneys.

41 IV. *Counterclaim*

Filed July 15, 1937, by leave of Court

Now comes the defendant by Sam E. Whitaker, Assistant Attorney General, and without waiving any of the defenses under the general traverse and special answer heretofore filed, by way of counterclaim states that the plaintiff, Edward F. Goltra, is indebted to the defendant in the sum of $4,817.88 as follows:

That on or about September 1, 1925, the defendant acting by the Engineer of the War Department at Memphis, Tennessee, delivered to the plaintiff, for use on the Steamer "Illinois," 657.7 barrels of fuel oil, on or about September 7, 1925, 1,368.1 barrels of fuel oil, and on or about September 26, 1925, 1,543 barrels of fuel oil; or in the aggregate 3,568.8 barrels of fuel oil. That the plaintiff used said fuel oil in operating said steamer. That the fair and reasonable value of said fuel oil was $1.35 per barrel,
42 or a total of $4,817.88, which the plaintiff promised and became obligated to pay to the defendant. That demand has been made for the payment of the same and payment has been refused.

Wherefore, the defendant prays judgment against the plaintiff for the sum of $4,817.88, with interest on the sum of $887.89 from September 1, 1925, until paid; on the sum of $1,846.93 from September 7, 1925, until paid; on the sum of $2,083.05 from September 26, 1925, until paid, and all other relief previously prayed for.

Respectfully submitted.

SAM E. WHITAKER,
Assistant Attorney General.

ALEXANDER HOLTZOFF,
Special Assistant to the Attorney General.
SAM M. WASSELL,
Attorney.

43 V. *Defendant's second counterclaim*

Filed Dec. 2, 1937, by leave of Court.

Now comes the defendant, by its Assistant Attorney General, and by leave of the Court first had and obtained files its second counterclaim herein as follows:

On or about June 15, 1928, the plaintiff filed with the Collector of Internal Revenue at St. Louis, Missouri, his income tax return for the year 1927, showing a net loss for the year and no tax due, whereas in fact the plaintiff had a net income for said year subject to income tax, amounting to $38,696.70, and the tax thereon amounted to the sum of $1,697.92, which the plaintiff failed to pay and for which he is indebted to the defendant with interest thereon. On or about December 7, 1931, plaintiff executed and filed with the Commissioner of Internal Revenue a consent that an assessment of income tax due from the plaintiff for the year 1927 might be made by said Commissioner on or before
44 December 31, 1932, except that if a notice of deficiency in tax was sent to the taxpayer on or before that date, the time for making assessments should be extended beyond that date by the number of days during which the Commissioner was prohibited from making an additional assessment, and for sixty days thereafter.

On or about December 29, 1932, a notice of deficiency for the year 1927 in the amount of $1,697.92 was mailed by the Commissioner of Internal Revenue to the plaintiff. On or about March 18, 1933, within the time extended by the said consent of December 7, 1931, the Commissioner of Internal Revenue assessed as the tax of the plaintiff for the year 1927 the sum of $1,697.92, together with interest thereon in amount of $510.21, aggregating the sum of $2,208.13. Notice of the assessment was given to the plaintiff, and demand for payment was made by the Collector of Internal Revenue on or about March 22, 1933; and on April 11, 1933, the Collector granted an extension of time for the payment of this amount to March 1, 1934. Said amount has not been paid by the plaintiff. Wherefore, the plaintiff is indebted to the defendant in the sum of $2,208.13 with interest, as provided by law.

On March 14, 1930, plaintiff filed with the Collector of Internal Revenue of St. Louis, Missouri, a tentative income tax return for the year 1929, disclosing no net income and no tax due, whereas, in fact, for the year 1929 the plaintiff had a net
45 income subject to income tax in the sum of $22,954.25, and the tax thereon amounted to the sum of $377.26. The time for filing the return for the year 1929 was extended by the Col-

lector to April 15, 1930, but plaintiff has filed no further return for that year.

On or about February 7, 1932, the Commissioner of Internal Revenue mailed to plaintiff a notice of the tax determination for the year 1929. On or about April 27, 1934, the Commissioner of Internal Revenue assessed the tax against plaintiff for the year 1929 in the amount of $377.26, together with a penalty of $94.32 for failure to file a return as required by law, and interest on said tax of $93.17. Notice of said assessment was given and demand for payment was made by the Collector of Internal Revenue on April 30, 1934, but said amount has not been paid by the plaintiff. Wherefore, the plaintiff is indebted to the defendant in the amount of $564.75, with interest as provided by law.

For the year 1930, plaintiff filed no income tax return, whereas, in fact, he had a net income subject to income surtax in the sum of $11,631.49, and the tax thereon amounted to the sum of $16.31, of which the sum of $8.00 had been paid at the source, leaving a balance of $8.31 due and owing. On February 7, 1934, the Commissioner of Internal Revenue mailed to the plaintiff a notice of the tax determination for the year 1930. On or about
46 April 27, 1934, the Commissioner of Internal Revenue assessed a tax for the year 1930 in amount of $8.31, together with a penalty of $2.08 for failing to file a return and interest on the tax of $1.55. Notice of assessment was given and demand for payment thereof was made by the Collector of Internal Revenue on or about April 30, 1934, but said amount has not been paid by the plaintiff. Wherefore, the plaintiff is indebted to the defendant in the sum of $11.94, with interest, as provided by law.

Wherefore, the defendant prays judgment against the plantiff on this counterclaim in the amount of $2,784.82, with interest as provided by law.

SAM E. WHITAKER,
Assistant Attorney General.

ALEXANDER HOLTZOFF,
Special Assistant to the Attorney General.
SAM M. WASSELL,
HERBERT A. BERGSON,
Attorneys for the United States.

47 VI. *Plaintiff's answer to defendant's second counterclaim*

Filed January 11, 1938

Now comes the plaintiff by his attorney of record and for answer to defendant's second counterclaim says that plaintiff admits the facts set forth in said second counterclaim concerning the

assessment of income taxes as therein set forth and says that he is anxious to pay any and all income taxes which may be due and owing by him to defendant. Plaintiff further says that he has been prevented from paying such income taxes as may be due from him to the defendant because long prior to the year 1927 defendant was indebted to plaintiff in a much larger sum than any taxes so due by plaintiff to defendant but defendant has failed and refused to pay to plaintiff the money so due to him; that had defendant paid to plaintiff the money due to him plaintiff could and would have paid all taxes due by
48 plaintiff to defendant. Plaintiff further says that he has called upon the officers of the Bureau of Internal Revenue and advised them of the fact that he is unable to pay such income taxes as may be due by him to defendant because the defendant has failed and refused to pay to plaintiff the money which defendant owes to plaintiff, and that he would be glad and willing to pay such taxes if and when defendant pays him.

Wherefore, plaintiff prays the Court that if any judgment should be rendered upon defendant's second counterclaim that there should not be included in said judgment any interest or penalties.

DWIGHT, HARRIS, KEOGEL & CASKEY,
Attorneys for plaintiff.

FREDERICK W. P. LORENZEN,
HERMAN J. GALLOWAY,
KING & KING,
Of Counsel.

49 *Duly sworn to by Herman J. Galloway; jurat omitted in printing.*

50 VII. *Suggestion of death of plaintiff and motion to substitute executors*

On April 11, 1939, plaintiff's attorney filed a suggestion of death of plaintiff and a motion to substitute Kate B. Goltra and E. Field Goltra, Jr., as executors, with certified copies of Will, etc. in open court, and said motion was allowed from the Bench.

VIII. *Argument and submission of case*

On April 11, 1939, the case was argued and submitted on merits by Mr. Herman J. Galloway for plaintiff, and by Mr. Alexander Holtzoff for defendant.

51 IX. *Special findings of fact, conclusion of Law, and opinion of the court by Whaley, Chief Justice*

Filed April 1, 1940

Mr. Herman J. Galloway for the plaintiffs. Messrs. Richard E. Dwight, Frederick W. P. Lorenzen, and Dwight, Harris, Koegel & Caskey were on the briefs.

Mr. Alexander Holtzoff, with whom Mr. Assistant Attorney General Francis M. Shea, for the defendant. Mr. Herbert A. Bergson was on the brief.

This case having been heard by the Court of Claims, the court, upon the evidence and the report of a commissioner, makes the following

Special findings of fact

1. Edward F. Goltra, the original plaintiff in this suit, at all times herein pertinent, was a citizen of the United States and a resident of St. Louis, Missouri.

Since the institution of this suit, Edward F. Goltra on April 2, 1939, departed this life, leaving as his executors Kate B. Goltra and E. Field Goltra, Jr., who have been substituted as plaintiffs. Wherever the word "plaintiff" is used herein, reference is made to Edward F. Goltra and not the executors.

2. The petition herein was filed July 21, 1934, pursuant to Private Act approved by the President on April 18, 1934, as follows:

52 "AN ACT

"Conferring jurisdiction upon the Court of Claims of the United States to hear, consider, and render judgment on the claims of Edward F. Goltra against the United States arising out of the taking of certain vessels and unloading apparatus.

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, that jurisdiction is hereby conferred upon the Court of Claims of the United States, whose duty it shall be, notwithstanding the lapse of time or the bar of any statute of limitations or previous court decisions, to hear, consider, and render judgment on the claims of Edward F. Goltra against the United States for just compensation to him for certain vessels and unloading apparatus taken, whether tortiously or not, on March 25, 1923, by the United States under orders of the Acting Secretary of War, for the use and benefit of the United States; and any other legal or equitable claims arising out of the transactions in connection therewith:

Provided, That separate suits may be brought with respect to the vessels and the unloading apparatus, but no suit shall be brought after the expiration of one year from the effective date of this Act: Provided further, That either party may appeal as of right to the Supreme Court of the United States from any judgment in said case at any time within ninety days after the rendition thereof, and any judgment rendered in favor of the claimant shall be paid in the same manner as other judgments of said Court of Claims are paid."

3. In the year 1917, after this country had entered the World War, traffic conditions in the Mississippi Valley became acute because of the inadequacy of rail transportation facilities, and defendant investigated the feasibility of developing river transportation facilities. Plaintiff, in cooperation with defendant, at his own risk and expense, conducted practical experiments as to the commercial feasibility of transporting coal from St. Louis to St. Paul and iron ore in the reverse direction by means of barges on the Mississippi River, and also conducted an experimental trip carrying knocked down ballast cars on barges from St. Louis to New Orleans to be sent to the armies of defendant in France. As a result of these experiments the engineers of the Corps of Engineers of the Army obtained information
53 necessary in order to prepare specifications and designs for a fleet of barges for operation on the Mississippi River. Plaintiff reported the results of these experiments to the President of the United States and asked that defendant give financial aid in defraying the cost of building a fleet such as is described in the next finding. Plaintiff offered to take over the vessels when completed, operate them, and reimburse the Government for the cost thereof in any fair manner.

4. Thereafter, as a wartime measure, defendant entered into contracts for the construction of 19 steel barges and planned the construction of 4 steel towboats to tow the barges. The barges and towboats were later built and became the property of defendant.

5. On March 1, 1919, plaintiff sent a letter to the Secretary of War relating to these boats and barges. In that letter he recited facts with respect to his efforts on the Mississippi River in 1917 substantially as stated in Finding 3 and concluded as follows:

"As the whole project will now before long be consummated, I desire to enter into an agreement for the operating and taking over of the whole project. In view of the fact that it has been generally understood that I was to take over the facilities, I have been preparing myself by acquiring the necessary fuel properties and ore properties and real estate for the terminal facilities, and

I feel that I should no longer be left without an agreement reduced to writing covering this matter.

"I respectfully refer you to your letter of the 25th of October 1917, addressed to Mr. E. N. Hurley, and also your letter of December 13, 1918, addressed to the Emergency Fleet Corporation, and to say in conclusion modestly as I can, that the entire inland waterway traffic matter took on form and substance as the direct result of the work I did on the Mississippi River in the Spring and Summer of 1917, and that the Inland Waterways Commission was an afterthought and result of said activities and was formed long after the moral obligation, at least, of turning over these vessels to me was entered into."

6. On May 28, 1919, plaintiff and defendant entered into a contract (hereinafter referred to as the "original contract"), and on May 26, 1921, plaintiff and defendant supplemented the
54 original contract by a contract (hereinafter referred to as the "supplement contract"). Both these contracts were prepared and drafted by the defendant, and were signed by the Chief of Engineers as party of the first part and by the plaintiff as party of the second part. A copy of the original contract is Exhibit B to the petition and a copy of the supplemental contract is Exhibit C to the petition and both are made a part of these findings by reference.

7. At all times herein pertinent and material, there was stationed at St. Louis an officer of the corps of engineers of the United States Army called "District Engineer." Among the functions of this officer was the duty of representing the Chief of Engineers in connection with the performance by the respective parties of the original contract and the supplemental contract and in supervising plaintiff's performance of the contracts.

8. From the year 1920 a fleet of barges and towboats known as the "Mississippi Warrior Service" has been operated in the transportation of freight as a common carrier on the Mississippi River between St. Louis and New Orleans and on the Warrior River. From 1920 to about June 1924 the Mississippi Warrior Service was conducted as one section of a division in the War Department known as the Inland and Coastwise Waterways Service, and from about June 1924 until the present time it has been conducted by Inland Waterways Corporation, a corporation organized under chapter 243 of the Act of Congress of June 3, 1924 (43 Stat. 360, 49 U. S. C. 151–6), the stock of which has at all times been wholly owned by defendant. At all times herein pertinent and material, the Mississippi Warrior Service was permitted by defendant to carry and did carry practically all classes of the more common

freight available for transportation on the Mississippi River at rates of 80 percent of the prevailing rail rates.

9. On March 2, 1921, plaintiff sent a letter to the Chief of Engineers as follows:

"I am asked by various river cities to quote a definite rate to them for transportation of commodities by means of the boats and barges being constructed under my government contract.

55 The different municipalities are in the process of installing terminal facilities and find that it is necessary to have definitely set forth by the Secretary of War what rates they may expect.

"I respectfully suggest that I be authorized to quote them the same rates as obtained on the Government Barge Line now operating on the lower river, viz—80% of the all-rail rates that now obtain.

"Will you be good enough, if you approve of my suggestion, to communicate with the Secretary of War, notifying him of same."

The "Government Barge Line" referred to in this letter was the Mississippi Warrior Service. On March 3, 1921, the Acting Chief of Engineers sent a letter to the Secretary of War which contains the following:

"It is represented by the lessee that it would be advantageous to the operation of the vessels if the rates of transportation should be fixed at 80 percent of the prevailing rail tariffs. These are the rates charged on the government line now operating below St. Louis, and in my opinion it would be in the interest of the shipping public to permit the same rates to be charged on this line. I accordingly recommend that the Secretary of War give his consent thereto."

On March 4, 1921, the Secretary of War gave his consent under the original contract to plaintiff's operation of the barges and towboats at rates less than the prevailing rail tariffs, i. e., 80 percent thereof. On or about March 10, 1921, plaintiff received from the office of the Chief of Engineers notification of such consent, and on or about March 14, 1921, he received from the District Engineer a copy of the letter of March 3, 1921, and the Secretary of War's endorsement thereon.

10. In the latter part of March 1922 plaintiff notified the Chief of Engineers that he was exercising his option to purchase the barges, towboats and unloading facilities, that he had appointed an appraiser for that purpose, and that he desired the Chief of Engineers to appoint another appraiser. The Chief of Engineers, April 1, 1922, refused to appoint another appraiser at that time on the ground that the terms of the lease had not yet begun to run.

11. On March 31, 1922. the Secretary of War sent a letter to plaintiff as follows:

"I am told there was recently an interview in the St. Louis Post-Dispatch in which you stated I had authorized you to
56 make rates on the lower Mississippi at eighty percent of the railroad rates. I have not seen the interview so I am not clear that what I have stated is definitely correct. But in any case, I told you at the time I could not authorize or approve any operation on the lower Mississippi that would enter into competition with the established line of barges. This line is operated for a definite purpose and should not be interfered with in that operation by any action of the Government.

"I said if there was freight on the lower Mississippi which could not be handled by the present operating line and it could be transported by your barges, in that case I would authorize a rate of eighty percent of the railroad rate. In making this statement I was assuming that what you told me—that the present line could not handle the material which you mentioned—is a fact; but any rate charged must be agreed to by General Downey and the operators of the present line.

"Your contract calls for a rate not less than the railroad rate without the approval of the Secretary of War and I shall give no approval which does not carry out this general statement."

The barge line referred to in this letter was the Mississippi Warrior Service. At the time when the letter was written, General Downey, referred to therein, was Chief of the Inland and Coastwise Waterways Service. The letter was released to the newspapers prior to the receipt thereof by plaintiff and was quoted in an article which appeared in the St. Louis Post-Dispatch on April 2, 1922, under a Washington date line bearing the date April 1.

12. On April 18, 1922, plaintiff had a meeting with the Secretary of War in Washington and at that time insisted that he had in writing been given the right to operate the barges and towboats at 80 percent of the full rail rates. The Secretary of War denied that plaintiff had a right to operate the barges and towboats at less than the full rail rates and stated that the delivery of the barges and towboats to plaintiff should be postponed until the Secretary of War had obtained legal advice with respect to plaintiff's rights.

13. Before the meeting with the Secretary of War on April 18, 1922, plaintiff went to the office of the Interstate Commerce Commission to arrange for filing certain barge line rates to be effective when the barges and towboats should be delivered to

him, and after the meeting with the Secretary of War an
57 official of the Interstate Commerce Commission informed plaintiff that he could not file his rates as long as the Secretary of War asserted the right to control plaintiff's rates.

14. On May 6, 1922, the Secretary of War sent a letter to plaintiff as follows:

"You are hereby notified that under the provisions of paragraph 2 (a) of the certain contract #E7076 between yourself and Major General William M. Black, Chief of Engineers, United States Army, dated May 28, 1919, as supplemented by an amendment thereto dated May 26, 1921, the consent and approval of the Secretary of War heretofore, on the 4th day of March 1921, given to the operation by you of the vessels covered by and included under the provisions of said contract, at transportation rates equal to 80% of the prevailing rail tariffs, is hereby withdrawn and cancelled as to any and all contracts, agreements or undertakings for transportation on the Mississippi River and its tributaries below the City of Saint Louis, Missouri, hereafter made and entered into by you.

"From and after this date you are authorized to operate said vessels on the Mississippi River and its tributaries below the said City of Saint Louis, only at transportation rates equal to and not less than the prevailing rail tariffs, save and except in such cases, and as to such transactions and commodities as the Secretary of War shall, upon application to him, have previously specifically consented to and approved."

On May 25, 1922, the Secretary of War sent a letter to plaintiff, the body of which is in part as follows:

"In compliance with the terms of my letter of May 6, 1922, you are hereby authorized to transport the following articles from port to port on the Mississippi River or its tributaries at not less than 80% of the all rail rates:

"'Liquids in bulk, including liquid asphalt or road oil, in drums; coal, lumber, sulphur, ties, cement, salt, sand, gravel, crushed rock; and grain over and above the capacity of the Mississippi-Warrior Service to handle such commodity.'

"Due to the conditions limiting the amount of grain which may be handled through New Orleans, and due to the limited elevator
58 capacity at Cairo and St. Louis, you will be required to obtain from Mr. Theodore Brent, Federal Manager, Mississippi-Warrior River Service, or his representative in St. Louis, Mr. J. P. Higgins, the amount of grain you may carry and specific dates upon which you can carry it."

15. On July 15, 1922, defendant delivered to plaintiff at St. Louis the 19 barges and 4 towboats.

The towboats delivered to the plaintiff were in all respects identical. Each was of the stern-paddle wheel type, equipped with a coal-burning steam engine rated at approximately 2,000 horsepower, was of 300-foot length over all, 58-foot beam and 10-foot depth of hold, and had a draft of approximately 4 feet with a light load of fuel and of approximately 5½ feet with a usual load of fuel.

The barges, when delivered to plaintiff, were in all respects identical and each was of steel construction with a spoon shaped bow especially designed for easy towing. Each of the barges was of 300-foot length, 48-foot beam, and 10-foot depth of hold, having a draft of approximately 19 inches when light, and a draft of 9 feet with a maximum load of 3,000 tons. Each of the barges had a double bottom and sides which, together with bulkheads, created 22 water- and oil-tight compartments between the outer and inner shells for carrying of all kinds of liquid cargoes, including crude oil and its derivative products; and each of the barges was completely equipped for loading and unloading liquid cargo by means of a 6-inch pipe system. Each of the barges also had an open cargo hold suitable for carrying materials or commodities not requiring protection from the weather. None of the barges was equipped to carry grain or other perishable commodities, but they could have been converted into barges capable of carrying such commodities by the construction of covers, roofs, or cargo boxes thereon. The barges were the most advanced in type of any river barge constructed and up to the present time are the only barges of this type on the Mississippi River.

16. Soon after the delivery of the fleet, it was discovered that the firing mechanism of the towboats was inefficient and plaintiff, in order to remedy this condition, installed oil-burning equipment on the towboat "Illinois." This change proved effective.

59 17. On August 7, 1922, immediately after the oil-burning equipment had been installed on the towboat "Illinois," plaintiff, with the approval of the District Engineer, caused this towboat and several of the barges to depart from St. Louis for Caseyville, Kentucky, situated on the Ohio River, to carry coal which had been offered to plaintiff for transportation from Caseyville, Kentucky, to the vicinity of St. Louis. The towboat "Illinois" and four of the barges returned to St. Louis on September 9, 1922. On the trip to and from Caseyville, the towboat "Illinois" carried a very light load of fuel, and the barges were empty on the way to Caseyville and loaded light to but a small fraction of their capacity on the return trip. The operation of the towboat and barges on the trip to and from Caseyville was interfered with by the very low water, groundings, and delays occasioned

by the necessity of waiting for dredges to clear crossing and dredging necessary beneath the coal tipple at Caseyville. During this trip mechanical breakdowns of the towboat "Illinois" occurred and general repairs and alterations were made on this towboat.

Experience on the trip to Caseyville and return indicated the necessity or desirability of making certain additions and changes on the towboat "Illinois" for its efficient operation and they were made between September 9, 1922, and September 26, 1922, by plaintiff's employees after the return of this towboat to St. Louis.

On September 26, 1922, plaintiff, with the approval of the District Engineer, caused the towboat "Illinois" and certain of the barges to depart for Hannibal, Missouri, to load a cargo of cement which the district office of the Corps of Engineers of the United States Army at Cincinnati, Ohio, wished to have transported to that point. The towboat "Illinois" and the barges experienced great difficulty on the trip to Hannibal by reason of extremely low water and the barges were loaded with cement at Hannibal to but a small fraction of their capacity. Nevertheless, the towboat and the barges experienced great difficulty by reason of low water on the trip from Hannibal to East St. Louis, Illinois. At the latter point plaintiff was advised that by reason of low water it would be impossible to navigate on the Ohio River,
60 and the Corps of Engineers at Cincinnati ordered plaintiff to unload the cargo of cement at East St. Louis for shipment by rail to Cincinnati. The towboat "Illinois" also experienced mechanical trouble on this trip, and repairs were made during the trip by plaintiff's employees. The towboat "Illinois" returned to the plaintiff's docks in St. Louis on October 14, 1922.

From October 14, 1922, until the end of November 1922, the towboat "Illinois" was tied up at plaintiff's docks in St. Louis with steam up and crew on board ready to tow any of the barges. While the towboat was so tied up further additions, changes, and repairs which were necessary or desirable for its efficient operation were made by plaintiff's employees.

Plaintiff did not operate the other three towboats during the period from July 15, 1922, to December 1, 1922.

18. About December 1, 1922, the plaintiff, with the approval and consent of the District Engineer, caused the barges and towboats to be placed in winter quarters where plaintiff expected to keep them until navigation could safely be resumed in 1923. For many years prior thereto it was customary at St. Louis to place commercial barges and towboats into winter quarters about December 1st and leave them there until sometime in March, in order to protect them from damage from ice and other winter elements. During this period it was unsafe to take such vessels out of winter quarters even though the river might be free of

ice because of the risk of injury due to sudden changes in the weather.

19. On December 13, 1922, Colonel Ashburn, Chief of the Inland and Coastwise Waterways Service, of which the Mississippi-Warrior Service was a section, sent a letter to plaintiff, as follows:

"On May 25, 1922, you were authorized to carry certain articles on the Mississippi River and its tributaries at not less than 80% of the all rail rates. Amongst them was 'grain over and above the capacity of the Mississippi-Warrior Service to handle such commodity.'

"The Secretary of War now authorizes you to carry any and all grain at not less than 80% of the all-rail rates that you can secure, regardless of the capacity of the Mississippi-Warrior Service to handle such commodity, and without any further action on your part being necessary. Please acknowledge the receipt of this letter.

61 "It is to be hoped that you will cooperate with the Mississippi-Warrior Service in your grain operations to such an extent that neither you nor they will be handicapped by the grouping of a number of barges at New Orleans loaded with grain which cannot be discharged promptly.

"A copy of this communication has been sent to the Grain Dealers Association of St. Louis, to Mr. Brent, and to the District Engineer Officer in St. Louis, for their information and guidance."

At the time when this letter was written, Colonel Ashburn and defendant knew that the barges and towboats were in winter quarters from which they could not then be removed without serious danger of injury, and that the barges were not then equipped to carry grain.

20. On January 5, 1923, the Secretary of War sent a memorandum to the Chief of Engineers as follows:

"1. I am returning the audit of the accounts of the Goltra Barge Line for the period July 15th–October 15, 1922, with memoranda from the Chief of Inland and Coastwise Waterways Service and from the Judge Advocate General attached thereto for your consideration.

"2. According to the view of the Judge Advocate General, we cannot annul the contract at this time with impunity. Suitable instructions should, therefore, be given the District Engineer at St. Louis that all future reports of operation will include the information necessary to clearly establish the right of the Government to take such action in the event of the failure of the lessee to carry out the terms of the contract.

"3. You will inform Mr. Goltra that it is the view of the War Department that the fleet should be operated to the maximum,

and failure to operate, if practicable, is a violation of the contract."

On January 16, 1923, the chief legal adviser to the Chief of Engineers submitted a memorandum to the Chief of Engineers, of which a paragraph reads as follows:

"If Mr. Goltra carried all of the freight offered him during the period, or up to the capacity of his barge line, then he has fully complied with the contract, and if he was ready at all times to carry freight of the kind contemplated by the contract which might be offered him, he would then be within the terms of his contract although none or very little might be offered, nor would the contract compel him to operate the fleet if the physical conditions on the river render it impracticable to do so."

62 On January 19, 1923, the Assistant Chief of Engineers forwarded to the District Engineer a draft of letter to be signed by the District Engineer and delivered to the plaintiff in accordance with the instructions of the Secretary of War. This letter was delivered to plaintiff by the District Engineer on January 29, 1923. The letter reads as follows:

"The Secretary of War has received a number of communications from commercial organizations interested in transportation on the Mississippi River complaining of the inactivity of the fleet of barges and towboats leased by you from the Government. He has also had under consideration my report of the audit of accounts of the operation of this fleet as made to October 15, 1922. This report, as you are aware, indicates a but limited movement of trade during the past season.

"The Secretary is not satisfied that the operation of the fleet has been as adequate and as vigorous as the last contract of May 28, 1919, contemplates and requires.

"The Secretary of War has therefore directed that you be informed that it is the view of the Department that during the period when navigation is practicable the fleet should be operated to the maximum and that failure to so operate it will be regarded as a violation of the contract."

21. Prior to the delivery to him of the letter dated January 19, 1923, plaintiff had, on January 15, 1923, sent a letter to the District Engineer requesting that certain dredging be done in the Mississippi River in front of the unloading facilities to enable barges to get into position for loading and unloading. The letter contained the following:

"We propose to begin operating the fleet as soon as the season opens, bringing in coal, ore, and other commodities, and I respectfully request that the dipper dredge which has been in this section and is now at work at Commerce, be detailed to do this

dredging, in order to put the channel in shape, as soon as it completes the work upon which it is engaged at present.

"While it will only take it a short time to do this work, nevertheless, February will soon be here and over, and we ought to be in position to start the fleet by the first of March, unless ice prevents."

22. While the towboats and barges were in winter quarters, plaintiff's employees were protecting the barges and towboats and were making alterations and repairs on some of them.

63

23. No representative of defendant ordered plaintiff to take the barges and towboats out of winter quarters. While the towboats and barges were still in winter quarters, the Secretary of War on March 3, 1923, transmitted to Colonel Ashburn, the Chief of the Inland and Coastwise Waterways Service, a letter addressed to plaintiff, with written instructions for the delivery of the letter to plaintiff, the body of which letter is as follows:

"Pursuant to the right reserved in paragraph eight of the contract dated May 28, 1919, and the supplement thereto dated May 26, 1921, between you and the United States, for the operation as a common carrier of a fleet of four towboats and nineteen barges, and the erection of unloading facilities, you are hereby notified that in my judgment you have not complied with the terms and conditions of said contract in that you have failed to operate the said towboats and barges as a common carrier and in other particulars.

"I, therefore, declare the said contract and the supplement thereto terminated. You are hereby directed upon the receipt of this notice immediately to deliver possession of the said towboats and barges, and any unloading facilities erected pursuant to the supplemental contract and paid for by funds of the United States, to Colonel T. Q. Ashburn, Chief, Inland and Coastwise Waterways Service, who will deliver this notice and who is instructed and authorized to receive and receipt for the property herein mentioned."

On the same day when the letter and instructions were transmitted to Ashburn, which was a Saturday, plaintiff was in Washington and Ashburn delivered the letter to plaintiff in Washington during the afternoon of Sunday, March 4, 1923.

24. Prior to the delivery to plaintiff of the letter of March 3, 1923, from the Secretary of War, plaintiff had no notice or knowledge of any intention on the part of the Secretary of War to attempt to terminate the original contract or the supplemental contract, and the Chief of Engineers had not been consulted by the Secretary of War about terminating the contracts and did not

know of the action of the Secretary of War in sending the letter until some time after the delivery thereof.

64 25. On March 8, 1923, plaintiff sent a letter to the Secretary of War, the body of which is as follows:

"On Sunday, March 4, 1923, there was served upon me by Colonel T. Q. Ashburn, Chief, Inland and Coastwise Waterways Service, your letter of March 3, 1923, stating that in your judgment I had not complied with the terms and conditions of my contract with the Government dated May 28th, 1919, in that I had failed to operate the towboats and barges specified in said contract as a common carrier, and in other particulars; that therefore you declared said contract terminated and directed me to immediately deliver possession of said towboats and barges, and unloading facilities erected pursuant to a supplemental contract, to said Colonel T. Q. Ashburn.

"This notice was served upon me while I was in Washington on other business, and without any previous intimation that any step of this kind was contemplated, and I was informed by Colonel Ashburn that I must give an answer to this notice by six o'clock today.

"The abruptness of the action attempted to be taken, and the very brief opportunity allowed for any answer on my part, necessarily requires that my reply be brief.

"Most respectfully, I decline to comply with your demand. To do so would deprive me, without any notice whatever, or opportunity to be heard, of rights and property lawfully acquired at a very large expenditure by me of time and money. I have in face of most unjust interference and restrictions fully complied with all the terms of my contract, and further, I have complied with every demand or requirement made of me by either you or the Chief of Engineers of the United States, the lessor named in my contract.

"The exercise of your judgment is, I am convinced, based upon inadequate and inaccurate information and has in fact no substantial basis on which to rest. This I believe will be fully demonstrated to you if I am granted a fair and impartial hearing to which as a citizen I am entitled, and which, in fairness and justice I now request."

Plaintiff never received any reply to this letter and was never granted the hearing requested in the letter.

26. Thereafter plaintiff caused the towboat "Illinois" to be prepared to resume operation and plaintiff caused it to have steam up and be ready to leave St. Louis for Caseyville, Kentucky, on Monday morning, March 26, 1923, in order to

65 tow some of the barges from the latter point with a cargo of coal which had there been offered for transportation.

65 27. On March 22, 1923, the Acting Secretary of War transmitted a memorandum to Ashburn, Chief of the Inland and Coastwise Waterways Service as follows:

"1. You are hereby designated as the representative of the United States for the purpose of taking possession of the towboats and barges leased by the United States to Edward F. Goltra under a contract dated May 28th, 1919.

"2. You will proceed to St. Louis, Missouri, Fayville, Illinois, and, if necessary, to Paducah, Kentucky, or elsewhere the said property may be found, and at once take possession of all of the said towboats and barges, or any number thereof that may be found.

"3. In taking such possession you are directed not to employ or use any action that will occasion strife, bodily force, or endanger the public peace.

"4. If physical resistance be offered to your taking such possession you are further directed to report that fact with all attending circumstances to me at once."

28. On Sunday, March 25, 1923, while plaintiff was in New York, Ashburn, and several men under his command, acting under orders of the Acting Secretary of War, went to the several places where seventeen of the barges and the four towboats lay moored in the possession of plaintiff's employees and took them from the possession of said employees without the consent of plaintiff or his employees for the use and benefit of the United States.

29. The Chief of Engineers did not know of the order of the Acting Secretary of War to Ashburn to seize the barges and towboats contained in the memorandum of March 22, 1923, or of the proposed seizure until after such seizure had occurred.

30. The District Engineer at St. Louis did not know of the order of the Acting Secretary of War to Ashburn to seize the barges and towboats contained in the memorandum of March 22, 1923, or of the proposed seizure until after such seizure had occurred. On March 26, 1923, the District Engineer, learning about the seizure, pursued the seized vessels down the Mississippi River because he deemed himself officially responsible for
66 the vessels, but upon being shown a letter from the Acting Secretary of War directing Ashburn to seize the barges and towboats he returned to St. Louis.

31. Prior to the seizure of the barges and towboats on March 25, 1923, the Chief of Engineers had not arrived at any judgment or conclusion or rendered any report to any one to the effect that plaintiff had in any manner failed to perform any of his obligations under the contract.

32. Commercial operation of barges and towboats of the same general type as plaintiff's in or out of St. Louis did not commence in the year 1923 prior to the seizure of the barges and towboats by Ashburn, and the Mississippi-Warrior Service did not operate any commercial tow in or out of St. Louis in the year 1923 prior to the seizure.

33. At the time of their seizure the barges and towboats were in good condition and repair and contained all of the alterations and repairs which plaintiff had placed thereon since delivery to him by defendants on July 15, 1922.

34. At all times from the delivery of the barges and towboats to plaintiff on July 15, 1922, until the seizure thereof on March 25, 1923, plaintiff, in connection with his operation and maintenance of the barges and towboats as a common carrier, maintained barge line docks with railroad connection and unloading facilities in St. Louis, offices in St. Louis equipped with telephone service, signs indicating to the public the location of the docks and offices of the Goltra barge line, and stationery indicating the offices of the Goltra barge line, and maintained a staff of employees to perform all services in connection with the operation and maintenance of the barges and towboats.

Plaintiff also held himself out as a common carrier by means of the barges and towboats between points on the Mississippi River and its tributaries of all cargo suitable for transportation by means of barges and towboats, which might be offered to him by anyone and was ready, willing, and able to transport such cargo. During this time plaintiff solicited business and endeavored to get cargo for transportation, and it was well known in the Mississippi Valley that he had the barges and towboats and was seeking business therefor.

35. During the late summer and fall of 1922, and winter of 1922–23, the water in the Mississippi River and its tributaries was lower than it had even been in recorded history.

67

During that period the low water and peculiar channel conditions caused the grounding of many barges and towboats, including those operated by the Mississippi-Warrior Service.

Barges and towboats could only be operated on the Mississippi River above St. Louis and below St. Louis to Cairo and on the Ohio River under great difficulties due to low water, which resulted in groundings, delay, and damage, even with light and unprofitable loads.

There was no possible cargo offered to plaintiff except that hauled by him and referred to in finding 17. From July 15, 1922, to March 25, 1923, plaintiff, as a common carrier, transported by means of the barges and towboats all the cargo offered that the barges were equipped to carry.

36. After Ashburn had seized the barges and towboats, a suit was commenced on plaintiff's behalf in the District Court of the United States for the Eastern District of Missouri against the Secretary of War, Ashburn, and the United States District Attorney at St. Louis, and a bill of complaint was filed therein. In the bill of complaint, plaintiff prayed, among other things, for temporary and permanent injunctive relief looking toward the restoration to him of the towboats and barges and the unloading facilities, and restraining defendants from interfering with plaintiff's possession thereof and an adjudication of plaintiff's rights under the original and supplemental contracts. On the same day, plaintiff was granted a temporary restraining order requiring defendants to restore to plaintiff possession of all of the towboats and barges which had been seized, and requiring defendants to show cause why temporary injunction should not issue.

37. The temporary restraining order and order to show cause, together with the bill of complaint, was served upon Ashburn as he was proceeding south on the Mississippi River with the towboats and barges which he had seized. Ashburn made a motion to quash said service, which motion was denied and Ashburn was ordered to return the towboats and barges to the jurisdiction of the court at the Port of St. Louis, Missouri. Thereafter, the towboats and barges remained in the custody of defendant until September 1924.

68 38. On or about April 27, 1923, General Lansing H. Beach, Chief of Engineers, signed a letter, which reads as follows:

"WAR DEPARTMENT,
"OFFICE OF THE CHIEF OF ENGINEERS,
"*Washington, April 27, 1923.*

"E. F. GOLTRA, Esq.,
"*La Salle Building, St. Louis, Missouri.*

"SIR: Pursuant to the right reserved in paragraph eight of the contract dated May 28, 1919, and the supplement thereto dated May 26, 1921, between you and the United States, for the operation as a common carrier of a fleet of four towboats and nineteen barges, and the erection of unloading facilities, you are hereby notified that in my judgment you have not complied with the terms and conditions of said contract in that you have failed to operate the said towboats and barges as a common carrier.

"I, therefore, declare the said contract and the supplement thereto terminated. You are hereby directed upon the receipt of this notice immediately to deliver possession to the United States of the said towboats and barges, and any unloading facili-

ties erected pursuant to the supplemental contract and paid for by funds of the United States.

"Very truly yours,

"(Signed) LANSING H. BEACH,
"Lansing H. Beach,
"*Major General, Chief of Engineers.*"

This letter was signed by General Beach at the direction of the Secretary of War and did not represent the judgment of the Chief of Engineers.

39. On September 4, 1924, after a hearing, Honorable C. B. Faris, United States District Judge, made an order granting temporary injunction which required the defendant forthwith to restore to plaintiff at the Port of St. Louis all of the barges, towboats, and other facilities and appliances seized by defendants, subject to an accounting for damages resulting from the use and possession of the property since the seizure thereof and restraining those defendants from taking any of the property from plaintiff's possession until further order of the court.

40. The order granting the temporary injunction was reversed on appeal on July 23, 1925, by the United States Circuit
69 Court of Appeals for the 8th Circuit in a decision reported in 7 F. (2d) 338, and on June 7, 1926, on writ of certiorari, the Supreme Court of the United States, in a decision reported in 271 U. S. 536, affirmed the decision of the Circuit Court of Appeals. Thereupon, between June 23, 1926, and August 1926, pursuant to and acting upon the mandate of the Supreme Court, defendant resumed the possession of the towboats, barges, and unloading facilities which had been acquired by defendant on March 25, 1923, but had been interrupted by the temporary injunction of September 4, 1924. Defendant has retained possession of the boats and barges since August 1926, and has caused the same to be operated as a part of the Mississippi Warrior Service.

41. On November 7, 1927, the Judge of the District Court for the Eastern District of Missouri, finally disposed of plaintiff's litigation with the Secretary of War and Ashburn, by granting a motion to dismiss an amended and supplemental bill of complaint. On November 2, 1928, the determination of the District Court was affirmed by the United States Circuit Court of Appeals for the 8th Circuit in a decision reported in 29 F. (2d) 257, and on March 11, 1929, the Supreme Court of the United States, in a decision reported in 279 U. S. 843, denied a petition for writ of certiorari.

42. On or about December 6, 1924, plaintiff again undertook to exercise his option to purchase the fleet, and for that purpose

appointed an appraiser, so notifying the Chief of Engineers and requesting him likewise to appoint an appraiser. The Chief of Engineers refused the request, assigning as his reason therefor the seizure of the towboats and barges and the then pending litigation.

42. For the purchase and installation of the oil burning equipment upon the towboat "Illinois" referred to in finding 16, plaintiff spent the amount of $6,414.28, which was a reasonable expense therefor, and for which sum plaintiff has never been reimbursed.

44. For desirable or necessary repairs to and replacement of defective feed pumps on the towboat "Illinois," plaintiff spent the amount of $1,027.23, and for other desirable or necessary additions, changes, and repairs on the towboat "Illinois,"
70 plaintiff spent the amount of $732.11. These expenditures were reasonable and plaintiff has never been reimbursed therefor.

45. For installation of powdered coal burning equipment on the towboat "Minnesota," which installation was desirable, plaintiff spent the amount of $7,140.89, which was a reasonable expense therefor and for which sum plaintiff has never been reimbursed.

46. At the time of the seizure of the barges and towboats on March 25, 1923, there were on the towboat "Illinois," fuel oil and other supplies belonging to plaintiff for which plaintiff had paid, and the reasonable value of which was $5,038.44. No part of the supplies was returned to plaintiff, and he has never been reimbursed therefor.

47. When the barges and towboats were returned to plaintiff in September 1924, under the order of the United States District Court, they were damaged and in need of many repairs other than ordinary current repairs, and many parts were missing from some of the towboats. None of these conditions existed when the barges and towboats were seized. By reason of these conditions, plaintiff spent for repairs and replacements the amount of $79,474.52, which was a reasonable expense therefor and for which sum he has never been reimbursed.

48. For insurance which plaintiff was required by Section 2 (b) of the original contract to procure, he spent the amount of $21,017.73 for the period from July 15, 1922, to March 25, 1923, and the amount of $30,830.30 for the period from September 1924 to July 1926, which amounts were a reasonable expense for insurance and for which plaintiff has never been reimbursed.

49. During both periods that plaintiff was in possession of the towboats and barges he operated at a loss.

50. Pursuant to the supplemental contract, plaintiff provided, in the year 1921, at his own expense, the tract of land (hereinafter referred to as the land provided by plaintiff), and concrete

runways located on part thereof, on which the unloading facilities referred to in the supplemental contract were to be erected and were to stand and operate; the remainder of the concrete runways was located on the land of the Mississippi Valley Iron Company by permission of that company procured by
71 plaintiff, and with the consent of the District Engineer to such arrangement. The land provided by plaintiff was accreted and was located in the City of St. Louis and extended from the Mississippi River on the east to the right-of-way of the St. Louis & Iron Mountain Railroad Company (Missouri Pacific) on the west, and was directly east of the 6500 South Broadway Block in the City of St. Louis. Plaintiff caused the runways to be built at his own expense according to plans submitted by plaintiff to and approved by the District Engineer. Defendant caused the unloading facilities referred to in the supplemental contract to be erected on the concrete runways. The unloading facilities consisted of a steel travelling crane which moved along the runways. The travelling crane was a substantial structure, of great height and length and was so equipped that the bucket of the crane, having a 10-ton capacity, could be lowered over the water into the holds of barges tied to the bank of the Mississippi River alongside said tract of land, and remove cargo from the barges and deposit the same in railroad cars or other means of transportation.

The construction of the concrete runways cost plaintiff the amount of $36,061.49, which was a reasonable cost therefor and for which plaintiff has never been reimbursed.

51. For the entire periods that plaintiff was in possession of the fleet the reasonable rental value of the land provided by him for runways and loading facilities was $6,000.00.

52. On February 13, 1930, plaintiff sent a letter to the Secretary of War as follows:

"In connection with my claim against the United States and/or the Inland Waterways Corporation, arising out of the occupation of real estate owned by me in South St. Louis, Missouri, by unloading facilities erected thereon by the United States Government under the provisions of the supplemental contract between the Chief of Engineers and myself, dated May 26, 1921, I beg to advise that if the United States and/or the Inland Waterways Corporation will immediately release and convey to me the said unloading apparatus and will immediately vacate and deliver to me possession of my property upon which said apparatus is located, I will release the Government from any and all claims accruing to me account of the aforesaid supplemental contract, save only my claims for use of my property, the
72 expense of the caretakers (Watchmen), and accrued interest

on these said claims, all up to the date of the aforesaid conveyance and notice of release to me of my property."

Defendant refused to take further action upon these claims in connection with the unloading facilities and the land provided by plaintiff because of the pendency of litigation between plaintiff and Inland Waterways Corporation involving the supplemental contract. On August 13, 1930, the Acting Secretary of War sent a letter to plaintiff, the body of which is as follows:

"Referring to the conversations and correspondence heretofore had relative to an unloading apparatus erected upon lands owned by you at St. Louis, Missouri, under the provisions of a supplemental contract dated May 26, 1921, and subsequently terminated, you are advised that the United States claims no right, title, or interest whatsoever in the said unloading apparatus, or in the real estate upon which it is situated, and waives whatever right, title, or interest it may be thought to have in the same."

On August 21, 1930, the plaintiff sent a letter to the Chief of Engineers, as follows:

"Herewith copy of a communication received by me from Acting Secretary of War F. H. Payne.

"Will you kindly advise me whether or not I am to understand that you, in your capacity as one of the parties to the supplemental contract referred to in Mr. Payne's herewith attached communication, concur in same and do now notify me you have no further use for my property and your leasing privilege under same is now by your free act positively terminated."

On August 28, 1930, the Chief of Engineers sent a letter to plaintiff, the body of which is as follows:

"1. Reference is made to your letter of the 21st instant regarding the unloading apparatus erected on your property at St. Louis, Mo., pursuant to a certain supplemental contract dated May 26, 1921.

"2. In reply you are advised that the Chief of Engineers concurs in the letter addressed to you under date of August 13, 1930, in which you were advised that the 'United States claims no right, title, or interest whatsoever in the said unloading apparatus, or in the real estate upon which it is situated, and
73 waives whatever right, title, or interest it may be thought to have in the same.'"

53. At all times the salvage value of the concrete runways was less than the cost of removing them.

Counterclaims

54. In September 1925, the defendant sold and delivered to the plaintiff 3,568.8 barrels of fuel oil, the reasonable value of which was $1.35 per barrel, or a total of $4,817.88, for which the plaintiff

has not paid anything to the defendant. No demand for payment of this sum was made before the filing by the defendant of its first counterclaim in this cause.

55. On or about June 15, 1928, the plaintiff filed with the Collector of Internal Revenue at St. Louis, Missouri, his income tax return for the year 1927, showing a net loss for the year and no tax due, whereas in fact the plaintiff had a net income for said year subject to income tax, amounting to $38,696.70, and the tax thereon amounted to the sum of $1,697.92, which the plaintiff failed to pay and for which he is indebted to the defendant with interest thereon. On or about December 7, 1931, plaintiff executed and filed with the Commissioner of Internal Revenue a consent that an assessment of income tax due from the plaintiff for the year 1927 might be made by said Commissioner on or before December 31, 1932, except that if a notice of deficiency in tax was sent to the taxpayer on or before that date, the time for making assessments should be extended beyond that date by the number of days during which the Commissioner was prohibited from making an additional assessment, and for sixty days thereafter.

On or about December 29, 1932, a notice of deficiency for the year 1927 in the amount of $1,697.92 was mailed by the Commissioner of Internal Revenue to the plaintiff. On or about March 18, 1933, within the time extended by the said consent of December 7, 1931, the Commissioner of Internal Revenue assessed as the tax of the plaintiff for the year 1927 the sum of $1,697.92, together with interest thereon in amount of $510.21, aggregating the sum of $2,208.13. Notice of the assessment was given to the plaintiff, and demand for payment was made by the Col-
74 lector of Internal Revenue on or about March 22, 1933; and on April 11, 1933, the Collector granted an extension of time for the payment of this amount to March 1, 1934. Said amount has not been paid by the plaintiff.

On March 14, 1930, plaintiff filed with the Collector of Internal Revenue of St. Louis, Missouri, a tentative income tax return for the year 1929, disclosing no net income and no tax due, whereas, in fact, for the year 1929 the plaintiff had a net income subject to income tax in the sum of $22,954.25, and the tax thereon amounted to the sum of $377.26. The time for filing the return for the year 1929 was extended by the Collector to April 15, 1930, but plaintiff has filed no further return for that year.

On or about February 7, 1932, the Commissioner of Internal Revenue mailed to plaintiff a notice of the tax determination for the year 1929. On or about April 27, 1934, the Commissioner of Internal Revenue assessed the tax against plaintiff for the year 1929 in the amount of $377.26, together with a penalty of $94.32 for failure to file a return as required by law, and interest on said

tax of $93.17. Notice of said assessment was given and demand for payment was made by the Collector of Internal Revenue on April 30, 1934, but said amount has not been paid by the plaintiff.

For the year 1930 plaintiff filed no income tax return, whereas, in fact, he had a net income subject to income surtax in the sum of $11,631.49, and the tax thereon amounted to the sum of $16.31, of which the sum of $8.00 had been paid at the source, leaving a balance of $8.31 due and owing. On February 7, 1934, the Commissioner of Internal Revenue mailed to the plaintiff a notice of the tax determination for the year 1930. On or about April 27, 1934, the Commissioner of Internal Revenue assessed a tax for the year 1930 in amount of $8.31, together with a penalty of $2.08 for failing to file a return and interest on the tax of $1.55. Notice of assessment was given and demand for payment thereof was made by the Collector of Internal Revenue on or about April 30, 1934, but said amount has not been paid by the plaintiff.

The total of the above taxes with interest and penalties is $2,784.82.

75 56. The counterclaims being valid are allowable.

Taking the amount of the counterclaims and all the relevant facts and circumstances, including the expenses of plaintiff, into consideration, the value for the lease, option to purchase, and all legal and equitable claims as of March 25, 1923, is $350,000.

Conclusion of law

Upon the foregoing special findings of fact, which are made a part of the judgment herein, the court decides, as a conclusion of law, that the defendant is entitled to recover on the counterclaims and the plaintiffs are entitled to recover, after deduction of the counterclaims, the sum of $350,000.00, with interest at six percent per annum from March 25, 1923, to the date of payment, not as interest but as a part of just compensation.

It is therefore ordered and adjudged that plaintiffs recover of and from the United States the sum of three hundred fifty thousand dollars ($350,000) with interest at six percent per annum, from March 25, 1923, to the date of payment.

Opinion

Whaley, Chief Justice, delivered the opinion of the court:

Before this suit was argued and submitted to the court, Edward F. Goltra departed this life on April 2, 1939, and his qualified executors were substituted as plaintiffs. Wherever the word "plaintiff" is used in this opinion, reference is made to Edward F. Goltra and not to the substituted plaintiffs.

This case was brought to the court under a special jurisdictional act, 48 Stat. 1322, which reads as follows:

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That jurisdiction is hereby conferred upon the Court of Claims of the United States, whose duty it shall be, notwithstanding the lapse of time or the bar of any statute of limitations or previous court decisions, to hear, consider, and render judgment on the claims of Edward F. Goltra against the United States for just compensation to him for certain vessels and unloading apparatus taken, whether tortiously or not, on March 25, 1923, by the Untited States under orders of the Acting Secretary
76 of War, for the use and benefit of the United States; and any other legal or equitable claims arising out of the transactions in connection therewith: * * *"

It will be seen that this act not only waives the statute of limitations but orders the court to hear, consider, and render judgment notwithstanding any previous court decisions and to give just compensation for the claims of plaintiff for the taking of certain vessels and unloading apparatus under orders of the Acting Secretary of War, whether the taking was tortious or not, and for any other legal or equitable claims arising out of the transactions.

When this bill was before the Committees of Congress, the Committees gave full consideration to the decision of the Supreme Court in the case of Goltra v. Weeks, 271 U. S. 536. This case involved an injunction and the Committees were aware that the merits of the case had never been considered by the court. The Committees also had before them a letter from the Attorney General urging the passage of the bill so that the plaintiff could have his day in court on the merits of the case. The real question involved was whether the cancellation of plaintiff's two contracts by the Secretary of War on March 3, 1923, followed by the seizure of the fleet on March 25, 1923, under orders of the Acting Secretary of War, was within the terms of the contracts between the plaintiff and the defendant. The Court held that the "lessor" mentioned in the contract meant the Chief of Engineers and not the Secretary of War.

On May 28, 1919, plaintiff entered into a contract with William M. Black, Major General, Chief of Engineers, U. S. Army, whereby the barges and towboats still under construction were leased to the plaintiff for a term of five years after delivery of the first unit, with an option to plaintiff to purchase the fleet and pay therefor in instalments over a period of fifteen years from the exercise of the option; the rental consisted of all net earnings made by the fleet and was to be credited on account of

the purchase price of the fleet. As part of the transaction plaintiff released the United States from all claims which he had against them as a result of certain engagements made for World War purposes.

On May 26, 1921, a supplemental agreement was entered into between the parties by which the plaintiff agreed to furnish, subject to the defendant's approval, a certain tract of
77 land and runway on which unloading facilities furnished by the lessor were to be erected. The unloading facilities were furnished by the lessor and erected on the land after the runways had been provided by the plaintiff.

On July 15, 1922, the defendant delivered the 19 barges and 4 towboats.

From the time of the delivery of the barges and towboats to the plaintiff, they were operated by the plaintiff as a common carrier until December 1, 1922, when they were placed in winter quarters with the approval and consent of the District Engineer, acting for and as the representative of the Chief of Engineers. It was understood that the fleet was to remain in winter quarters until navigation could be safely resumed in the spring of 1923. During the time that plaintiff had possession of the fleet it was operated to the best advantage by him and plaintiff, as a common carrier, transported all the cargo offered that the barges were equipped to carry. There was no complaint or protest by the lessor of the operation of the fleet or the failure to accept cargo by the defendant.

On March 3, 1923, the Secretary of War transmitted to Colonel Ashburn, who was one of the officials of the Mississippi Warrier Service, which was a fleet of barges and towboats owned by the Government and operated on the Mississippi River, a letter addressed to plaintiff in which the Secretary of War stated that, pursuant to the right under paragraph eight of the original contract and the supplemental contract, in his judgment, the plaintiff had not operated the barges and towboats under the terms and conditions of the contract and had failed to operate them as a common carrier and declared the contract and the supplemental contract to be terminated. He requested the plaintiff to deliver the fleet and the unloading facilities to Colonel Ashburn. This letter was delivered by Colonel Ashburn to the plaintiff in Washington, D. C., during the afternoon of Sunday, March 4, 1923.

On March 8, 1923, plaintiff declined to comply with the demands of the Secretary of War complaining of the unjust interferences and restrictions which had been interposed and asserted that he had complied with every demand and requirement of

the Chief of Engineers who was the lessor named in the contract.

78 On March 22, 1923, the Acting Secretary of War authorized Colonel Ashburn, as a representative of the United States, to take possession at once of all of the barges and towboats or any number that could be found. Colonel Ashburn, acting upon the above order, went to St. Louis on March 25, 1923, and while plaintiff was absent took the fleet from the possession of the fleet's employees without their consent for the use and benefit of the United States. The nature of the seizure is best described by the United States District Engineer who wired the Chief of Engineers as follows:

"Col. Ashburn with the Federal Barge Line towboat Vicksburg and about forty men arrived at Goltra fleet yesterday Sunday morning about eleven overawed Goltra's men and towed four boats and one barge down river about six miles Stop Vicksburg left them on Illinois side, came back to St. Louis, placed four Goltra barges at Barge Line Terminal and went down river with all other Goltra barges wintered at this city * * *."

After the seizure a suit was commenced in plaintiff's behalf in the District Court of the United States against the Secretary of War, Colonel Ashburn, and the United States District Attorney. A temporary order was obtained and the barges were returned to the jurisdiction of the court and brought to St. Louis but they remained in the custody of the defendant until September 4, 1924.

After the hearing on the application for the injunction, the District Judge granted plaintiff's request and ordered the barges returned to him. At this trial a letter from the Chief of Engineers cancelling the contract was presented for the consideration of the court on behalf of the defendant. This letter is dated April 27, 1923, several months after the cancellation of the contract by the Secretary of War and more than a month after the seizure of the fleet by the acting Secretary of War.

The case was appealed to the Circuit Court which reversed the District Judge and the case was then taken to the Supreme Court of the United States.

On June 7, 1926, the Supreme Court affirmed the decision of the Circuit Court and the fleet was delivered to the defendant during June and September of that year. In its decision the Supreme Court held (271 U. S. 536, 548, 550):

79 "Nor does the circumstance that, as in this case, the lessor whose judgment is to prevail is a party to the contract alter the legal result. Of course the Chief Engineer is not the real party in interest. He is a professional expert, as such

was designated as lessor, and is really acting only as an agent for the Government. * * *

"* * * The right of the lessor to take over the fleet under § 8 of the contract, unless there was fraud in the judgment of termination by the Chief of Engineers, the lessor, of which we have found no evidence, is clear. We think, therefore, the injunction should be dissolved and the fleet restored to the lessor."

It will be seen that the decision of the Supreme Court was based on the assumption that the Chief of Engineers had exercised his judgment in a fair and impartial way and terminated the contract.

In the trial of the i[illegible] case it is shown that the Chief of Engineers did not exer[illegible]is own judgment but was coerced, after the Acting Secretary of War had seized the fleet, in signing the order cancelling the contract.

The evidence is clear and convincing that the Chief of Engineers believed the plaintiff had performed his part of the contract and that there was no cause or reason which would justify him in cancelling the contract. He testified that he did not exercise his own judgment but that, when the letter was presented to him for his signature, he was forced to sign.

It is apparent from the record that the Chief of Engineers did not exercise his judgment in cancelling the lease before the cancellation of the contract by the Secretary of War and the subsequent seizure of the fleet by the Acting Secretary of War.

The cases are too numerous for citation that the plaintiff was entitled to an uninfluenced decision by the Chief of Engineers and that he alone could act.

The Secretary of War had no authority under the contract to exercise the right conferred upon the Chief of Engineers and, until the Chief of Engineers had cancelled the contract, the action of the Secretary of War, in cancelling the contract, was ultra vires, and the action of the Acting Secretary of War in ordering the seizure of the fleet by Colonel Ashburn was a tortious act. Burton Coal Co. v. United States, 60 C.
80 cls. 294, affirmed 273 U. S. 337; Williams Eng. & Cont. Co. v. United States, 55 C. Cls. 349; Michael H. King v. United States, 37 C. Cls. 428; Sun Shipbuilding Co. v. United States, 76 C. Cls. 154; Helvetia Milk Condensing Co. v. United States, 74 C. Cls. 142 and Lutz Co. v. United States, 76 C. Cls. 405.

The plaintiff having been deprived of his lease and option to purchase, illegally and wrongfully, the question arises as to what compensation he shall receive.

Plaintiff only had a contract for a lease of the fleet for five years with an option to purchase. He attempted to exercise the option to purchase but the defendant refused to comply with the

provision of the contract with reference to the appointment of arbitrators to fix the value which should be paid.

During the operation of the fleet from July 1922, to December 1, 1922, the plaintiff sustained a loss. This was a new service and large expenditures had to be made for prospective business, for providing land and runways, for costs incurred for advertising the service, insurance, and for repairs and changes in the towboats. Plaintiff was prohibited from charging less than the rail rate. The loss can be well understood.

It is contended by the plaintiff that, in arriving at just compensation, an offer to rent the fleet made years after the fleet had been seized and the rental value of similar vessels on the Mississippi River should be taken into consideration. These contentions cannot be sustained. Sharp v. United States, 191 U. S. 341, 348, 349; Clarke v. Hot Springs Electric Light & Power Co., 55 Fed. (2d) 612; and Sommers v. Commissioner of Internal Revenue, 63 Fed. (2d) 551.

There were no other towboats and barges on the Mississippi River at that time which could have been rented. There was no market value for the lease and option to purchase. Reproduction less depreciation or cost less depreciation are not fair bases on which to place valuation. Plaintiff is entitled to have taken into consideration what he spent in inaugurating the service and the cost of repairs and changes made to the towboats and the supplies furnished by him. Prospective profits can not be considered. No profits were made by the plaintiff during
81 the time he had possession of the fleet from September 1924, to July 1926. This was primarily due to the fact that all shippers on the Mississippi River realized that the fleet was tied up in litigation and possession was being sought through the courts by the defendant.

As was said by Justice Butler in Standard Oil Co. v. So. Pacific Co., 268 U. S. 146, 156:

"It is to be borne in mind that value is the thing to be found and that neither cost of reproduction new, nor that less depreciation, is the measure or sole guide. The ascertainment of value is not controlled by artificial rules. It is not a matter of formulas, but there must be a reasonable judgment having its basis in a proper consideration of all relevant facts."

As the plaintiff only possessed a lease with an option to purchase and there being no market value, it is necessary for the Court in arriving at an amount sufficient to compensate him for injuries sustained, to take into consideration all outlays made by him including the rental value of his land, and make reasonable deduction for the less time engaged and for release from

care, trouble, risk, and responsibility attending a full execution of the contract. United States v. Speed, 75 U. S. 77.

In Hetzel v. Baltimore & Ohio Railroad Co., 169 U. S. 26, 37, 38, 39, the court said:

"* * * in such inquiries, absolute certainty as to the damages sustained is in many cases impossible. All that the law requires is that such damages be allowed as, in the judgment of fair men, directly and naturally resulted from the injury for which suit is brought. This is the rule which obtains in civil actions for damages. They have their foundation in the idea of just compensation for wrongs done."

The court quoted with approval from Baker v. Drake, 53 N. Y. 211, 220, as follows:

"The proof may sometimes be rather difficult upon the question whether the damage was the just or proximate result of the breach of the covenant. In such case it does not come with very good grace from the defendant to insist upon the most specific and certain proof as to the cause and the amount of the damage when he has himself been guilty of a most inex-
82 cusable violation of the covenants which were inserted for the very purpose of preventing the result which has come about."

In Hoffer Oil Corporation v. Carpenter, 34 Fed. (2d) 589, 592, the court said:

"A person who has violated his contract will not be permitted to reap advantage from his own wrong, by insisting upon proof which, by reason of his breach, cannot be furnished. * * *

"A party, who has broken his contract, will not be permitted to escape liability because of the lack of a perfect measure of the damages caused by his breach. * * *

"A reasonable basis for computation, and the best evidence which is obtainable under the circumstances of the case and which will enable the jury to arrive at an approximate estimate of the loss, is sufficient."

See Eastman Kodak Co. of New York v. Southern Photo Materials Company, 273 U. S. 359.

Taking all the relevant facts into consideration and after allowing the counterclaims, in making a jury award, the Court concludes that the sum of $350,000.00 is just compensation for the vessels and unloading apparatus and all other claims, legal or equitable, arising out of the transactions.

Judgment is entered for the plaintiffs in the sum of $350,000.00, with interest at six percent per annum, not as interest but as a part of just compensation, from March 25, 1923, to the date of

payment. Virginia Engineering Company v. United States, 89 C. Cls. 457.

It is so ordered.

LITTLETON, Judge; and GREEN, Judge, concur.

WHITAKER, Judge; and WILLIAMS, Judge, took no part in the decision of this case.

83 X. *Judgment*

At a Court of Claims held in the City of Washington on the first day of April, A. D., 1940, judgment was ordered to be entered as follows:

Upon the special findings of fact, which are made a part of the judgment herein, the court decided, as a conclusion of law, that the defendant is entitled to recover on the counter-claims and the plaintiffs are entitled to recover, after deduction of the counter-claims.

It is therefore ordered and adjudged that the plaintiffs recover of and from the United States the sum of three hundred fifty thousand dollars ($350,000) with interest at six percent per annum, from March 25, 1923, to the date of payment.

84 XI. *Petition for appeal to the Supreme Court of the United States*

Filed June 19, 1940

Comes now the United States, defendant herein, and states that on the first day of April 1940, this Court entered judgment against it in the sum of $350,000, together with interest thereon at the rate of 6 per cent per annum from March 25, 1923, to the date of payment.

The United States, believing that the judgment of this Court is incorrect, prays that it may be allowed to appeal to the Supreme Court of the United States for reversal of the judgment of this Court, and that a transcript of the record of this cause, duly authenticated, may be sent to the Supreme Court of the United States.

The United States submits and present to the Court herewith a statement showing the basis of the jurisdiction of the Supreme Court of the United States to entertain an appeal in this cause.

FRANCIS BIDDLE,
Solicitor General.

85 XII. *Assignment of errors*

Filed June 19, 1940

Comes now the United States by Francis Biddle, its Solicitor General, and avers that the Court of Claims has erred.

1. In holding that the Act of April 18, 1934, conferring jurisdiction upon it to entertain, hear, and render judgment on the claims of Goltra against the United States for just compensation for certain property taken, authorized it to award interest from the date of the alleged taking.

2. In holding that the use of the words "just compensation" in the act called for the assessment of the same measure of damage as would apply to a taking of property by eminent domain.

3. In holding that the act, in the absence of specific language expressly directing it so to do, authorized it to award interest.

86 4. In failing to hold that Section 177 of the Judicial Code precluded it from allowing interest on any claim against the United States prior to the time of the rendition of judgment.

5. In including in its judgment interest on the claim.

This 19th day of June 1940.

FRANCIS BIDDLE,
Solicitor General.

128 XIV. *Order allowing appeal to the Supreme Court of the United States*

Filed June 19, 1940

This cause having come before this Court on this 19th day of June 1940, upon the petition of the United States, the defendant herein, praying for leave to appeal to the Supreme Court of the United States for reversal of the judgment herein and that a duly certified copy of the record of this cause be transmitted to the Clerk of the Supreme Court of the United States, and the Court having heard and considered this motion, together with petitioner's statement showing the basis of the jurisdiction of the Supreme Court of the United States to entertain an appeal in this cause, the same having been duly filed with the Clerk of this Court, it is, therefore, by the Court—

Ordered and adjudged that the United States, defendant herein, be and it is hereby allowed an appeal from the order
129 and judgment of this Court, and that a duly certified copy of the record be transmitted to the Clerk of the Supreme Court of the United States. It is further—

Ordered that the United States be and it is hereby permitted a period of 40 days from the date hereof within which to file and docket this appeal to the Supreme Court of the United States.

This 19th day of June 1940.

RICHARD S. WHALEY,
Chief Justice of the Court of Claims of the United States.

131 [Citation in usual form showing service on Herman J. Galloway, filed June 19, 1940, omitted in printing.]

133 XVII. *Request for transcript of record*

Filed June 19, 1940

TO THE CLERK OF THE COURT OF CLAIMS.

SIR: You are hereby requested to prepare a transcript of the record to be filed in the Supreme Court of the United States pursuant to an appeal allowed in the above-entitled cause, and to including in such transcript of record the following:

Pleadings, argument, and submission of the case, special findings of fact found by the court, conclusion of law, opinion of the court, order of the court entering judgment, and all papers filed with the court in the above-entitled cause since the entry of judgment.

Respectfully submitted.

FRANCIS BIDDLE,
Solicitor General.

134 XVIII. *Petition for cross-appeal*

Filed June 24, 1940

To the Honorable Chief Justice and Judges of the Court of Claims:

Come now the plaintiffs herein and respectfully show that the United States, the defendant herein, has heretofore filed a petition for the allowance of an appeal from the judgment of this Court made and entered herein on the 1st day of April 1940 and that said petition was allowed on the 19th day of June 1940; and the plaintiffs also considering themselves aggrieved by said judgment insofar as it limits the amount of recovery here by way of just compensation to the sum of $350,000, with interest at six percent per annum, not as interest but as part of just
135 compensation, from March 25, 1923, to the date of payment pray for the allowance of a cross-appeal to the Supreme Court of the United States from that part of said judgment for the reasons stated in the assignment of errors filed herewith.

Plaintiffs further pray that a transcript of the record of this cause, as indicated in the accompanying praecipe, duly authenticated, may be sent to the Supreme Court of the United States.

Dated June 24, 1940.

DWIGHT, HARRIS, KOEGEL & CASKEY,
Dwight, Harris, Koegel & Caskey,
Attorneys for Plaintiffs.

HERMAN J. GALLOWAY,
Of Counsel.

136 XIX. *Assignment of errors*

Filed June 24, 1040

Come now, Kate B. Goltra and E. Field Goltra, Jr., Executors of the Estate of Edward F. Goltra, Deceased, Plaintiffs herein, and file the following assignment of errors upon which they will rely in the prosecution of the cross-appeal for the allowance of which petition is herewith filed:

I. The Court erred in failing to make the following special findings of fact requested by plaintiffs each of which was made by the Commissioner of this Court assigned to hear this cause:

A. The requested special finding of fact embodied in the Commissioner's finding 59, which is as follows:

"The average cost of the towboats was $375,000 each. The average cost of the barges was $110,000 each.

137 "The value of the towboats and the barges from the year 1922 and thereafter until the end of the year 1924 was approximately the same as the original cost thereof."

B. The requested special finding of fact embodied in the Commissioner's finding 60, which is as follows:

"The reasonable market rental value on the Mississippi River and its tributaries of the towboats from March 1922 to the present time was 1/15th of one percent per day of the cost of each towboat, the lessee furnishing all of the crew, food, fuel, and other supplies, and assuming all risks and costs of insurance, maintenance, repairs necessary for operation and a return of the towboats to the lessor at the end of the lease in the same condition in which received, and all other costs of operation, except the expense of annual heavy overhaul and repair amounting to an average of $2,000 per year per towboat.

"The reasonable market rental value on the Mississippi River and its tributaries of the barges from March 1922 to the present time was 1/10th of one percent per day of the cost of each barge, the lessee furnishing all of the crew, food, fuel, and other supplies, and assuming all risks and costs of insurance, main-

tenance, repairs necessary for operation and a return of said barges to the lessor at the end of the lease in the same condition in which received, and all other costs of operation, except the expense of annual heavy overhaul and repair amounting to an average of $500 per year per barge."

C. The requested special finding of fact embodied in the Commissioner's finding 61, which is as follows:

"In May 1925, C. J. Fiero, vice president and general manager of Standard Oil Company of Louisiana, and E. F. Wieck, superintendent of lighterage of that company, desired to acquire for that company the use of the barges and towboats for the transportation of crude oil from its pipe line terminal at Grand Lake, Arkansas, down the Mississippi River to its refinery at Baton Rouge, Louisiana, and for the transportation of refined oils up the river from Baton Rouge on the return trips, and for this purpose made an offer in behalf of Standard Oil Company of Louisiana to lease from plaintiff the nineteen barges and
138 four towboats upon the following terms: Standard Oil Company of Louisiana was to furnish all of the crew, food, fuel, and other supplies and to assume all risks and costs of insurance, maintenance, repairs, and all other costs of operation, and was to pay to plaintiff rental at the rate of $\frac{1}{15}$th of one percent per day on the cost of said towboats, assumed to be $400,000 each, and $\frac{1}{10}$th of one percent per day on the cost of said barges, assumed to be $110,000 each, for a period of five years with the option to Standard Oil Company of Louisiana to continue to lease upon such terms for an additional period of five years. Plaintiff was willing and desired to accept the offer, but on account of the then pending litigation over his right to continue in possession of the barges and towboats, he was unable to do so as he could not assure Standard Oil Company of Louisiana of possession of the barges and towboats for the terms of the proposed lease. This offer was made in good faith and Standard Oil Company of Louisiana was at all times financially able to carry out the obligations which would have devolved upon it had a lease been made pursuant to its offer."

D. The requested special finding of fact embodied in the Commissioner's finding 62, which is as follows:

"In the year 1926 it would have been impossible for plaintiff to for plaintiff to obtain a fleet of barges and towboats similar to those here involved in the open market and it would have required a period of at least two years after the date of the letting of the contracts therefor to have such barges and towboats built.

"In the year 1926 it would have been impossible for plaintiff to obtain a fleet of barges and towboats similar to those here involved in the open market and it would have required a period

of at least twenty months after the date of the letting of the contracts therefor to have such barges and towboats built."

139 E. The requested special finding of fact embodied in the the Commissioner's finding 64, which is as follows:

"On March 25, 1923, the towboats and barges had a remaining normal and useful life of about thirty years."

F. The requested special finding of fact embodied in the Commissioner's finding 66, which is as follows:

"The land provided by plaintiff for the unloading facilities had a reasonable value of $20,000 throughout the period from 1921 to 1931."

G. The requested special finding of fact embodied in the Commissioner's finding 68, which is as follows:

"The erection of the unloading facilities on the runways under the provisions of the supplemental contract cost $210,000."

H. The requested special finding of fact embodied in the Commissioner's finding 71, which is as follows:

"During the period from March 25, 1923, to the present time, the reasonable rental value of the unloading facilities was $25,000 per year."

I. The requested special finding of fact embodied in the Commissioner's finding 72, which is as follows:

"From the time when plaintiff surrendered the unloading facilities to defendant in July 1926, pursuant to the court order, to the present time, plaintiff has provided one day and one night watchman for necessary services in watching the unloading facilities for the benefit of defendant and has obligated himself to pay or has paid $125 per month for each watchman, which was a reasonable expense therefor and for which plaintiff has never been paid."

140 J. The requested special finding of fact embodied in the Commissioner's finding 75, which is as follows:

"In the years 1923 through 1926, both inclusive, if any loan had been negotiated for a sum of money sufficient to reproduce the towboats and barges under a loan agreement permitting and requiring repayment in fifteen equal annual installments during a period of fifteen years commencing one year after the making of the loan, the borrower would have been required to pay interest on such loan for the duration thereof at the rate of 6.138 percent per year. In addition the borrower would have been required to pay a substantial commission or discount and to give as a bonus an interest in the operation of the towboats and barges."

II. This Court erred in failing to take into consideration in determining the amount of recovery an offer made by the Standard Oil Company of Louisiana to rent the Goltra fleet, the

substance of which offer is embodied in the requested special finding of fact which is the Commissioner's finding 61, set forth above.

III. This Court erred in finding and concluding that there was no market value for Edward F. Goltha's lease of said fleet and the option to purchase.

IV. This Court erred in failing to take into consideration, in arriving at the award made to the plaintiffs, an amount measured by the net reasonable market rental value of said fleet on the Mississippi River and its tributaries from March 1922 to the date of judgment.

141 V. This Court erred in failing to take into consideration, in arriving at the award made to the plaintiffs, an amount measured by the rental value of said fleet which amount said fleet could and would have earned but for the seizure of said fleet by defendant's officers for the use and benefit of defendant.

VI. This Court erred in failing to take into consideration in arriving at the award made to the plaintiffs, prospective profits which would have resulted from plaintiff's property rights in said fleet but for the seizure thereof by representatives of defendant for the use and benefit of defendant.

VII. This Court erred in limiting the amount of recovery by way of just compensation to the sum of $350,000 with interest at six percent per annum, not as interest, but as part of just compensation.

Wherefore, plaintiffs pray that said judgment, insofar as appealed from by plaintiffs, may be modified or reversed, and that an award may be made to the plaintiffs taking into consideration all of the factors and evidence properly relating thereto, and for such other and further relief as to the Court may seem just and proper.

Dated June 24, 1940.

DWIGHT, HARRIS, KOEGEL & CASKEY,
Dwight, Harris, Koegel & Caskey,
Attorneys for Plaintiffs.

HERMAN J. GALLOWAY,
Of Counsel.

145 XXI. *Order allowing cross-appeal to the Supreme Court of the United States*

Filed June 25, 1940

This cause having come before this Court on this 25th day of June 1940, upon the petition of the plaintiffs, praying for leave to cross-appeal to the Supreme Court of the United States for reversal or modification of a part of the judgment herein and

that a duly certified copy of the record of this cause be transmitted to the Clerk of the Supreme Court of the United States, and the Court having heard and considered this motion, together with petitioners' statement showing the basis of the jurisdiction of the Supreme Court of the United States to entertain a cross-appeal in this cause, the same having been duly filed with the Clerk of this Court, It is therefore, by the Court—

Ordered and adjudged that the plaintiffs be and they are hereby allowed a cross-appeal from that part of the order of judgment of this Court, to which this cross-appeal is addressed and that a duly certified copy of the record be transmitted to
146 the Clerk of the Supreme Court of the United States. It is further—

Ordered that the plaintiffs be and they are hereby permitted a period of 40 days from the date hereof within which to file and docket this cross-appeal to the Supreme Court of the United States.

This 25th day of June 1940.

RICHARD S. WHALEY,
Chief Justice of the Court of Claims of the United States.

148 [Citation in usual form showing service on Francis Biddle, filed June 25, 1940, omitted in printing.]

150 XXIV. *Plaintiff's request for portions of record*

Filed and allowed June 25, 1940

To WILLARD L. HART, Esq., *Clerk of the United States Court of Claims:*

In compliance with Rule 10 of the Supreme Court of the United States, the plaintiffs hereby indicate the portions of the record to be incorporated in the transcript of record on this cross-appeal:

I. The petition (Record, pp. 1 through 36, both inclusive).

II. The general traverse filed by defendant.

III. The Report of Commissioner (Record, pp. 47 through 81, both inclusive).

IV. The first paragraph of plaintiffs' request for special
151 findings of fact and exceptions to the Commissioner's report (Record, p. 82) and the signature thereto (Record, p. 98).

V. Defendant's exceptions to the Commissioner's Report (Record, pp. 99 to 139, both inclusive) and the signatures thereto (Record, p. 158).

VI. Caption of defendant's brief (Record, p. 349) and the defendant's request for findings of fact (last paragraph on Record, p. 355) and signatures thereto (Record, p. 396).

VII. Plaintiffs' Exhibits 20, 22, 56, 57, 83, 86 D, 86 C, 111, and 142.

VIII. (a) That part of the testimony E. F. Wieck, comprised of questions and answers numbered 1 through 101, both inclusive, on pages 263 through 296 of the transcript.

(b) That part of the testimony of C. I. Fiero, comprised of questions and answers numbered 1 through 101, both inclusive, on pages 307 through 324 of the transcript.

(c) That part of the testimony of Thomas L. Faudree, comprised of questions and answers 1 through 69, both inclusive, on pages 334 through 345 of the transcript, and the following questions and answers 97, 98, 99, 100, on pages 350 and 351 of the transcript, and questions and answers 106, 107, and 108 and the colloquy following the latter question on page 352 and 353 of the transcript.

152 (d) All of the testimony of John F. Cogswell included on page 378 through the phrase "Witness excused" on page 403 of the transcript.

(e) That part of the testimony of E. Field Goltra, Jr., comprised of questions and answers 1 through 7, both inclusive, on pages 411 and 412 of the transcript; all questions and answers 29 through 40, both inclusive, on pages 416, 417, and 418 of the transcript; questions and answers 51, 52, and 53 on page 422 of the transcript; questions and answers 29 through 43, both inclusive, on pages 2284 through 2287 of the transcript.

(f) That part of the testimony of Henry Cason comprised of questions and answers numbered 1 through 23, both inclusive, on pages 612 through 616 of the transcript.

(g) All of the testimony of Herman T. Pott included on page 676 through the phrase "Witness excused" on page 692 of the transcript.

(h) All of the testimony of Ira Nelson Davenport included on page 703 through the phrase "Witness excused" on page 708 of the transcript.

(i) All of the testimony of Charles T. Campbell included on pages 732 through 751 of the transcript, both inclusive.

(j) That part of the testimony of John L. Taylor comprised of questions and answers numbered 1 through 22, both inclusive, on pages 752 through 765 of the transcript.

(k) All of the testimony of T. P. Butler and George
153 J. Walker included on pages 778 through 799, both inclusive.

(l) The testimony of Edward F. Goltra comprised of questions and answers numbered 1 through 4, both inclusive, on pages 802 and 803 of the transcript; questions and answers numbered 439 through 492, both inclusive, on pages 915 through 924 of the transcript; questions and answers numbered 553, 554, and 555 on pages 937 and 938 of the transcript; questions and answers numbered 688 through 691, both inclusive, on page 981 of the transcript; question and answer numbered 697 on page 982 of the transcript; questions and answers numbered 37 through 42, both inclusive, on pages 2237 and 2238 of the transcript; questions and answers numbered 1 through 10, both inclusive, on pages 1160, 1161, and 1162 of the transcript; questions and answers numbered 706 through 710, both inclusive, on pages 985 and 986 of the transcript.

(m) All of the testimony of Philip Rohan on pages 1145 through 1159 of the transcript, both inclusive.

(n) All of the testimony of Michael Hendy on pages 1226 through 1159 of the transcript, both inclusive.

(o) The testimony of DeWitt C. Jones, comprised of questions and answers numbered 1 through 4, both inclusive, on pages 1259 and 1260 of the transcript; questions and answers numbered 141 through 147, both inclusive, and questions and answers numbered 141 through 146, both inclusive, on pages 1310 through 1314
154 of the transcript.

(p) That part of the record commencing with "Mr. Holtzoff: It is hereby stipulated and agreed that if Lieut. Col. John C. Gottwals" on page 2137 of the transcript, continuing through all of page 2138 and through page 2139 to "(Discussion off the record followed)."

(q) All of the testimony of A. A. Coyle on pages 2141 through 2166 of the transcript, both inclusive.

(r) That part of the testimony of Maximilian von Pagenhardt comprised of questions and answers numbered 1 through 3, both inclusive, on pages 1635 through 1641; questions and answers numbered 24 through 50, both inclusive, on pages 1627 through 1633, and questions and answers numbered 56 through 75, both inclusive, on pages 1635 through 1641; questions and answers numbered 322 through 368, both inclusive, and the colloquy down to question 369 on pages 1705 through 1721 of the transcript; questions 423 through 527, both inclusive, on pages 1734 through 1757 of the transcript.

(s) Pages 2293 and 2294, down through the words "Plaintiff rests," of the transcript.

IX. The "Agreed statement of facts," which is a stipulation of facts signed by the parties hereto.

X. The Special Findings of Fact and Opinion of the Court herein.

155 XI. The judgment herein.

DWIGHT, HARRIS, KOEGEL & CASKEY,
Attorneys for Plaintiffs.

156 [Clerk's certificate to foregoing transcript omitted in printing.]

158 In Court of Claims of the United States

Title omitted.

Stipulation as to record on cross-appeal and petition for certiorari by plaintiffs

I

It is hereby stipulated and agreed by and between the plaintiffs herein through Dwight, Harris, Koegel & Caskey, their Attorneys of Record, and the defendant herein by and through the Solicitor General of the United States, that the record to be transmitted to the Supreme Court upon plaintiffs' cross-appeal and upon any petition for writ of certiorari which plaintiffs may file in the Supreme Court and the record to be considered by the Supreme Court upon such cross-appeal and such petition for writ of certiorari or hearing thereon if such writ be granted shall consist of:

A. The record filed by defendant upon its appeal to the Supreme Court of the United States in this cause;

159 B. This stipulation and the matters and things set out herein; and

C. Such other portions of the transcript and record herein as are specified in this stipulation; in lieu and instead of the record specified in the praecipe heretofore filed herein by plaintiffs upon such cross-appeal and in lieu of any additional designation by defendant.

II

A. It is further hereby stipulated by and between the parties hereto that for the purposes of such record in the Supreme Court of the United States and for the purposes of this cross-appeal or plaintiffs' petition for certiorari the following facts, set out in this paragraph A, which plaintiffs requested the Court of Claims to include in the Special Findings of Fact may be taken and considered as true:

"1. The average cost of the towboats was $375,000 each. The average cost of the barges was $110,000 each.

The value of the towboats and the barges from the year 1922 and thereafter until the end of the year 1924 was approximately the same as the original cost thereof.

"2. In May 1925, C. J. Fiero, vice president and general manager of Standard Oil Company of Louisiana, and E. F. Wieck, superintendent of lighterage of that company, desired to acquire for that company the use of the barges and towboats for the transportation of crude oil from its pipe line terminal at Grand Lake, Arkansas, down the Mississippi River to its refinery at Baton Rouge, Louisiana, and for the transportation of refined oils
160 up the river from Baton Rogue on the return trips, and for this purpose made an offer in behalf of Standard Oil Company of Louisiana to lease from plaintiff the nineteen barges and four towboats upon the following terms: Standard Oil Company of Louisiana was to furnish all of the crew, food, fuel, and other supplies and to assume all risks and costs of insurance, maintenance, repairs, and all other costs of operation, and was to pay to plaintiff rental at the rate of 1/15 of one percent per day on the cost of said towboats, assumed to be $400,000 each, and 1/10 of one percent per day on the cost of said barges, assumed to be $110,000 each, for a period of five years with the option to Standard Oil Company of Louisiana to continue to lease upon such terms for an additional period of five years. Plaintiff was willing and desired to accept the offer, but on account of the then pending litigation over his right to continue in possession of the barges and towboats, he was unable to do so as he could not assure Standard Oil Company of Louisiana of possession of the barges and towboats for the terms of the proposed lease. This offer was made in good faith and Standard Oil Company of Louisiana was at all times financially able to carry out the obligations which would have developed upon it had a lease been made pursuant to its offer.

"3. In the years 1922 through 1924, it would have been impossible for plaintiff to obtain a fleet of barges and towboats similar to those here involved in the open market and it would have required a period of at least two years after the date of the letting of the contracts therefor to have such barges and towboats built.

"In the year 1926 it would have been impossible for the plaintiff to obtain a fleet of barges and towboats similar to those here involved in the open market and it would have required a period of at least twenty months after the date of the letting of the contracts therefor to have such barges and towboats built.

"4. The erection of the unloading facilities on the runways under the provisions of the supplemental contract cost $210,000.

"5. During the period from March 25, 1923, to the present time, the reasonable rental value of the unloading facilities was $25,000 per year.

161 "6. From the time when plaintiff surrendered the unloading facilities to defendant in July 1926, pursuant to the court order, to the present time, plaintiff has provided one day and one night watchman for necessary services in watching the unloading facilities for the benefit of defendant and has obligated himself to pay or has paid $125 per month for each watchman, which was a reasonable expense therefor and for which plaintiff has never been paid."

It is further stipulated and agreed that the testimony forming the basis of the facts stated in paragraph II, A 2, above, was given by E. F. Wieck, at the pertinent time the Marine superintendent of Standard Oil Company of Louisiana, by C. I. Fiero, at the pertinent time vice president of that Company, by Thomas L. Faudree, who at the time of the making of the offer referred to therein was an employee of Goltra but who at the time of his testimony was not connected with Goltra, and by Goltra, and that when plaintiffs introduced this testimony the defendant made no objection to its introduction in evidence. It is further stipulated and agreed that nothing in this stipulation shall deprive the defendant of whatever right, if any, which it may have now to argue the incompetency, immateriality and irrelevancy of the facts stated in paragraph II, A 2, above.

B. It is further stipulated and agreed by and between the parties that plaintiffs requested the Court of Claims to include in the Special Findings of Fact, that:

"The reasonable market rental value on the Mississippi River and its tributaries of the towboats from March 1922 to the present time was 1/15th of one percent per day of the cost of each towboat, the lessee furnishing all of the crew, food, fuel, and other supplies, and assuming all risks and costs of insurance, maintenance, repairs necessary for operation and a return of the towboats to the lessor at the end of the lease in the same condition in which received, and all other costs of operation, except the expense of annual heavy overhaul and repair amounting to an average of $2,000 per year per towboat.

"The reasonable market rental value on the Mississippi River and its tributaries of the barges from March 1922 to the present time was 1/10th of one per cent per day of the cost of each barge, the lessee furnishing all of the crew, food, fuel, and other supplies, and assuming all risks and costs of insurance, maintenance, repairs necessary for operation and a return of said barges to the lessor at the end of the lease in the same condition in which received, and all other costs of operation, except the expense of annual heavy overhaul and repair amounting to an average of $500 per year per barge."

And that defendant in lieu of that finding had requested the following finding:

"The rental rate charged by the Chief of Engineers for leasing War Department towboats and barges to private parties was 1/15 of 1 percent per day of the original cost of each towboat or barge. This rate was applicable when the lessor bore the cost of all ordinary and extraordinary repairs and replacements, and when the rental period was of brief duration. When the lessee bore the cost of all replacements and of ordinary and extraordinary repairs, the rental rate was 1/45 of 1 percent per day of the cost of each towboat or barge. During the period from March 1922 to the present time the commercial rate of renting towboats and barges on the Mississippi River and its tributaries was considerably less than the rate charged by the Chief of Engineers."

The following is a summary of the evidence in the record with relation to this finding and defendants requested finding.

1. The testimony of Goltra, E. F. Wieck, Thomas L. Faudree, and C. I. Fiero on behalf of plaintiffs with relation to the offer of the Standard Oil Company of Louisiana embodied in paragraph II, A 2, above.

162 2. The letter of Colonel John C. Gotwals written on July 16, 1924 in answer to plaintiff's inquiry which letter is plaintiff's Exhibit 83 and the body of which is as follows:

"Referring to your request for rental charges for floating plant under current practice along the Mississippi, you are now advised. Rental per month (All insurance other risks assumed by lessee) Steel towboats—2 percent of cost per month. Steel barges—3 percent of cost per month.

"These rates are approximate and substantially correct for present practice."

As to this letter the following was stipulated as Lieutenant Colonel John C. Gotwals' testimony:

"That on July 16, 1924 he wrote a letter to plaintiff, Edward F. Goltra, which has been marked in evidence as Plaintiff's Exhibit No. 83 at page 922 of the record; that such letter was written in response to an oral request of Mr. Goltra asking for the rental rates of Government plant in vogue at that time on the Mississippi River; that such requests were very common as substantial quantities of Government plant were rented to both private parties and other Government agencies at that time; that the clause contained in the letter 'All insurance other risks assumed by the lessee' means that insurance and other risks in the way of libel or liability charges possible under admiralty laws or Federal or State Laws would be a charge against the

lessee; that the lessor would bear the expense of annual heavy overhaul and repair, of depreciation and of interest; and that the lessee would bear the expense of current maintenance and upkeep only, with a view to returning the plant in the condition in which it was received;

"That he would testify on cross-examination that he is unable to give any estimate of what might be charged if the lessor would assume current upkeep and maintenance and that these charges depend upon usage of the equipment, and as they are necessary to the continued use of the plant are always assumed by the lessee."

163 3. The testimony of A. A. Coyle on behalf of the plaintiffs that he had been continuously engaged in the shipbuilding business on inland waterways in the United States since 1881; that he was employed by the United States Government in 1911 as an inspector of materials and construction of barges; that he remained in this employment until 1913; that in 1913 he resigned from the Government service and worked in St. Louis; that in 1917 he returned to Government employment and continued in the Government's employ until 1926; that he was Chief Inspector of materials and construction and Advisor of Mr. Mitchell, who was in charge of the details of the construction of the towboats and barges involved in this litigation; that he is still a naval architect residing at Dubuque, Iowa; that he is familiar with the cost of repairing and keeping up boats and barges, and that during all the time when he was engaged in the shipbuilding business the repair and upkeep of boats and barges was part of his work and duties; that in his opinion the usual annual overhaul and repair, excluding matters of accident and wrecks, for the first 20 years of the life of the Goltra towboats would have amounted to approximately $2,000 a year for each towboat, and that the usual annual overhaul and repair, excluding matters of accident and wrecks, of each of the Goltra barges for the first 20 years of the life of each barge would have amounted to approximately $500 a year for each barge.

4. The testimony of E. F. Wieck, on behalf of the plaintiffs, that he was engaged in river business in the Mississippi Valley from 1907 to the date of his testimony in 1936; that
164 he was engaged for a part of the time in the contract towing business; that thereafter he was in charge of river transportation for Standard Oil Company of Louisiana; that his duties required him to supervise the chartering of boats and barges, as well as the construction and operation thereof; that he was acquainted with the Goltra fleet; that in his opinion the reasonable market rental value of the Goltra fleet in 1922 and

approximately down to the time of his testimony would have been the same as the offer for that fleet made on behalf of Standard Oil Company of Louisiana in 1925 which was on a bare-boat basis, lessee to assume all charges, including repairs and insurance at a rental of 1/10th of one percent per day of the cost of the barges and 1/15th of one percent per day of the cost of the towboats, based on an estimated cost of the towboats of $400,000 each and the barges of about $110,000 each.

5. The testimony of Thomas L. Faudree on behalf of plaintiffs, that he had 44 years of river experience in the Mississippi Valley as mate, pilot, captain, and superintendent of various transportation units; that he was acquainted with the Goltra fleet, and that in his opinion the bare-boat rental value of that fleet, lessee to assume all expenses of upkeep, repairs, risks, and insurance was 1/15th of one percent of the cost of the towboats and 1/10th of one percent of the cost of the barges.

6. The testimony of Herman T. Pott on behalf of plaintiffs, that he had been engaged in the construction, repair, and rental of floating equipment on the Mississippi River and
165 its tributaries for 16 years; that he was with the Dravo Contracting Company when it built some of the barges involved in the present litigation; that in his opinion the fair market rental value of the barges on the Mississippi River from 1927 to the date of his testimony in 1937 was approximately 3% of the cost per month.

7. The testimony of Charles T. Campbell, on behalf of plaintiffs, that at the time of his testimony in 1936 he had had 37 years of experience in river transportation in the Mississippi Valley and that such experience included the rental of barges and towboats; that he was acquainted with Goltra's barges and towboats, that in his opinion the fair market rental value of plaintiffs' barges in 1922 and 1923 would have been about $90.00 per day for each barge on a bare boat basis and that as the demand increased after 1923 such rental would increase until from 1926 down to the time of his testimony the fair market rental value would have been at least $100,00 per day per barge; that towboats of approximately the horsepower of the Goltra towboats had in his opinion during the entire time from 1923 to the date of his testimony a fair market rental value on a bare boat basis of approximately $7,500 per month per towboat.

8. The testimony of Faudree, Pott, Campbell, and Taylor, a shipbuilder from Pittsburgh, all on behalf of plaintiffs that during all the time from 1923 to the date of their testimony the demand for river equipment such as the Goltra boats and
166 barges exceeded the supply thereof and the testimony of Faudree, Fiero, and Wieck, all on behalf of plaintiffs,

that the above mentioned shortage of river equipment was particularly noticeable with reference to barges like the plaintiffs' which were capable of carrying oil.

9. The testimony of Maximilian Von Pagenhardt, on behalf of defendant, that he was a naval architect; that he was the designer of the Goltra barges and towboats; that the Government rental rate was 1/15th of one percent per day of the original cost of a towboat and 1/10th of one percent per day of the original cost of a barge for very short periods not exceeding a few months; that in his opinion the commercial rental rate and long term rental rate was under the Government rate which he had mentioned and less than 1/10th of one percent per day of the original cost.

10. The testimony of Edward Fanflik, on behalf of defendant, that he was an assistant in the cost accounting section of the Chief of Engineers office; that the rental value of steel towboats and barges fixed by the Chief of Engineer's Office was only for interdepartmental loans of equipment and that the rental rate for such loans in 1925 was 1/15th of one percent per day of the original cost of each barge and each towboat. That this figure assumed that the lessor would bear the expense of current maintenance, upkeep, and repair; that the rental value thus testified to was according to the witness's records made up as follows: 1/45th of one percent applicable to depreciation and 2/45ths of one percent applicable to maintenance and repairs; that he had never operated a barge or towboat and that his only information about rental of equipment was such information as
167 came to him as an accountant. That he did not know the rental rate for towboats and barges between private parties in St. Louis. During the examination of this witness a circular letter dated December 1, 1919 issued by the Chief of Engineers was introduced in evidence. This letter explained the Chief of Engineers' rental rate of 1/15th of one percent per day on barges and towboats and contained the following paragraphs:

"6. When plant is loaned to private parties the rates given in paragraph 3 will be increased 50 percent to provide for the complete protection of the public interest involved, including the assumption by the United States of all risks of injury to Government employees while the plant is engaged in such work.

"7. The cost of all operating expenses for labor and supplies during the period of the loan will be borne by the borrowing appropriation, or by the private party or other borrowing agency.

"8. The cost of all renewals, and of ordinary and extraordinary

repairs to the plant, as authorized by the Chief of Engineers, excepting those incidental to damages such as are ordinarily covered by fire and marine insurance, will be borne by the lending appropriation, i. e., the one to which the plant belongs, and expenditures for these purposes from the borrowing appropriations, or by the borrowing agency, will be duly deducted from the charges set forth above, in making payments for the loan of the plant. The excepted items will be charged to the borrowing appropriation or agency."

C. It is further stipulated and agreed by and between the parties that plaintiffs requested the Court of Claims to include in the Special Findings of Fact, that:

"On March 25, 1923, the towboats and barges had a remaining normal and useful life of about thirty years."

168 And that defendant requested a similar finding of fact in which the remaining normal useful life was stated to be twenty years. The following is a summary of the evidence in the record with relation to this finding and defendant's requested finding.

1. The testimony of Philip Rohan, on behalf of plaintiffs, that he had been in the boatbuilding and repairing business in the Mississippi Valley for the past 36 years; that for 18 years of this time he had headed his own company, which operated Marine ways on the Mississippi River in the vicinity of St. Louis; that he was acquainted with the equipment known as the Goltra fleet; that in his opinion the reasonable useful life of the towboats and barges in ordinary commercial use, given the usual and customary care and current repairs was about 50 years.

2. The testimony of Ira Nelson Davenport, on behalf of plaintiffs, that he had been in the boatbuilding business in the Mississippi Valley at Dubuque, Iowa, from 1914 to the date of his testimony in 1936; that he was acquainted with the Goltra fleet; that in his opinion the normal life of the Goltra barges with reasonable care, in ordinary commercial use, would be from 35 to 40 years.

5. The testimony of Maximilian von Pagenhardt, on behalf of defendants, that he was a naval architect; that he had designed the Goltra fleet; that in his opinion the ordinary useful life of barges and towboats on the Mississippi River was 20 years; that the steamer "Sprague," which had been rebuilt

169 several times and which was the only towboat operating on the Mississippi River comparable in size to plaintiff's towboats, had been operating for 40 years at the time of Von Peganhardt's testimony.

D. It is further stipulated and agreed by and between the parties that plaintiffs requested the Court of Claims to include in the Special Findings of Fact, that:

"The land provided by plaintiff for the unloading facilities had a reasonable value of $20,000 throughout the period from 1921 to 1931."

And that defendant requested a similar finding of fact in which the value of the land was stated to be $10,412.50. There was testimony in the record by two real estate appraisers called by plaintiff that the land had a value between $27,000 and $29,640 and there was testimony by a St. Louis real estate appraiser who was an employee of defendant's War Department that the land had a value of $10,412.50.

E. It is further stipulated and agreed by and between the parties hereto that plaintiffs requested the Court of Claims to include in its Special Findings of Fact, that:

"In the years 1923 through 1926, both inclusive, if any loan had been negotiated for a sum of money sufficient to reproduce the towboats and barges under a loan agreement permitting and requiring repayment in fifteen equal annual installments during a period of fifteen years commencing one year after the making of the loan, the borrower would have been required to pay interest on such loan for the duration thereof at the rate of 6.138 percent per year. In addition the borrower would have been required to pay a substantial commission or discount and to give as a bonus an interest in the operation of the towboats and barges."

170 And that defendant requested in place of this finding the following:

"During the period from 1923 to 1926, inclusive, the interest rate on loans was between 3.68 and 5.12 percent per year."

Plaintiffs' evidence with relation to the subject matter of this finding and defendant's requested finding is embodied in plaintiffs' Exhibit 142, which is the affidavit of John R. Dillon, offered in evidence pursuant to stipulation between the parties that such affidavit might be received with the same force and effect as if Mr. Dillon had personally appeared and testified in this case. Plaintiffs' Exhibit 142, hereto annexed, shall be included as a part of the record herein. Defendant's evidence with relation to the subject matter of this finding and defendant's requested finding is incorporated in defendant's Exhibit A–36. Defendant's Exhibit A–36, hereto annexed, shall be included as a part of the record herein.

III

It is further stipulated and agreed by and between the parties hereto that the record to be transmitted to the Supreme Court upon plaintiffs' cross-appeal and upon any petition for writ of certiorari which plaintiffs may file shall include in addition to this stipulation and the matters referred to above in this stipulation the following:

171 "JULY 18, 1923.

"MR. EDWARD F. GOLTRA,
"*St. Louis, Mo.*

"DEAR MR. GOLTRA: The Secretary of War directs me to inform you as follows:

"The insurance on the towboats and barges, which were held by you under the lease, and which are now operating under the jurisdiction of the United States Court, expired yesterday.

"Under the terms of your contract, it is necessary that you should keep insurance upon these boats, and he expects you to do so until such time as the case can finally be decided by the Supreme Court. A perfectly reasonable rental is being set aside and held, to be paid, if the Supreme Court decides that your lease is non-recoverable by the Secretary of War.

"Very truly yours.

(S) T. Q. ASHBURN
"*Colonel, C. A. C. (D. O. L.),*
"*Chief of the Inland and Coastwise Waterways Service.*"

IV

It is further stipulated and agreed by and between the parties hereto that nothing in this stipulation shall deprive the defendant of whatever rights, if any, it may have to move to dismiss the cross-appeal or to affirm the decision below or to object on the cross-appeal to the consideration of any facts other than those embodied in the special findings of fact.

FRANCIS BIDDLE,
Solicitor General.
DWIGHT, HARRIS, KOEGEL & CASKEY,
Attorneys for Plaintiffs.

172 *Plaintiff's Exhibit No. 142*

STATE OF NEW YORK,
COUNTY OF NEW YORK, *ss:*

John R. Dillon, being duly sworn, deposes and says:

I am and since 1929 have been a member of the firm of Hayden, Stone & Co., investment bankers, with offices at 25 Broad Street, New York, N. Y., and at 75 Federal Street, Boston, Mass.

My firm is, and it or its predecessors have been for more than thirty years, engaged in investment and private banking, financing various projects, buying, selling, and underwriting the issuance of securities including mortgage bonds, debentures, notes, and equipment trust certificates. I have been continuously engaged in this business since 1916.

I am connected with the following corporations, among others, in the capacities stated:

Lone Star Cement Corporation—Vice-President, Chairman of the Executive Committee and Director,

Twentieth Century-Fox Film Corporation—Director and Member of Executive Committee,

Raybestos-Manhattan, Inc.—Director and Member of Finance Committee,

Continental-Diamond Fibre Co.—Director,

American Agricultural Chemical Co.—Director,

Curtiss-Wright Corporation—Director and Member of Executive Committee,

Wright Aeronautical Corporation—Director and Member of Executive Committee.

I am acquainted with the financial market and the general financial situation as it existed in the United States in the years 1922 through 1926.

I have been requested to testify as to the probable rate of interest which a borrower, a resident of St. Louis, Missouri,
173 would have had to pay on a loan negotiated in the period 1923–1926, inclusive, to finance the construction of 19 barges and 4 towboats, substantially as described in Plaintiff's Exhibit 20 in the case of Goltra v. The United States, now pending in the Court of Claims of the United States. I have been asked to make the following assumptions:

a. *Amount.*—The amount of the loan would have been approximately $3,590,000.

b. *Owner's equity.*—The amount of the loan would have represented substantially the entire cost of construction and the borrower would have had little, if any, investment in the boats and barges.

c. *Term.*—The loan would have been repayable, with interest, in fifteen equal annual instalments, commencing one year after the making of the loan.

d. *Operation.*—The towboats and barges would have been operated on the Mississippi River and its tributaries.

e. *Security.*—The lender would have received a mortgage or other satisfactory lien on the boats and barges.

Upon the foregoing assumptions, no banking institution, public or private, commercial or investment, would, in my opinion, have made or underwritten such a loan. My reasons for this opinion, among others, are that the loan would have represented 100% of the cost of the chattels upon which the loan would have been made and that the repayment period was as long as fifteen years. In my judgment, the only possible sources of such financing would have been private parties who would have required an annual interest rate of not less than six percent, a substantial commission or discount, and a share in the enterprise operating the barges and towboats.

174 I have made an investigation of the principal financing of maritime and shipping issues offered by banking institutions in 1925, 1926, and 1927. Exhibit A hereto annexed is a table of all such financing as disclosed by the standard authority, National Statistical Service in its "American Underwriters and Their Issues." In some instances the issuing dates on this table have been taken from other financial services such as Poor's or Moody's Manual and these sources are indicated. The average coupon interest rate of all such financing was 6.138 percent. The offering price to the investing public, on the whole, was not more than the par value of the securities. The interest cost to the borrower, however, would have been in excess of the coupon rate because of usual underwriting and distributing commissions charged by bankers, which, in my opinion, would have brought the interest cost to an average figure of at least 6½%. While no compilation of maritime issues as such is known to me to be available for 1923 and 1924, it is my opinion from a knowledge of financial conditions and interest rates generally that the interest cost to a borrower would have been approximately the same in 1923 and 1924 as in the period from 1925 through 1926.

If the borrower who wished to acquire the boats and barges could have complied with the accepted standards for borrowing, i. e., a loan of no more than two-thirds of the value of the security, for a term of not more than five years, he could not, in my opinion, have borrowed the requisite sum for an annual interest rate of less than six percent, and if he had sold his obligations or procured underwriting therefor, he would have been

175 required, in my opinion, to pay a discount of at least five

percent. If the loan could have been placed by the borrower directly with a bank, it is my opinion that no additional discount would have been payable to the bank.

I have been asked also to give my opinion as to interest rates which the borrower, a resident of St. Louis, Missouri, above referred to, would have had to pay in the event that the loan originally negotiated in the period from 1923 through 1926 were at any time or at several times refinanced after the repayment of some instalments of principal on the original loan. I annex hereto, as Exhibit B, a table of maritime and shipping issues offered by banking institutions for some years subsequent to the year 1927. Exhibit B is taken from the same source as Exhibit A, and extends that exhibit through the year 1931. After that year no maritime or shipping issues are recorded in the source referred to until March 1936, when one small issue was underwritten. For the reasons heretofore stated, the interest cost to the borrowers listed in Exhibit B would, in my opinion, have been substantially in excess of the coupon rate or the interest rate at the offered price, because a commission would have been charged by underwriting and distributing bankers. Furthermore, in my opinion, during the depression years the value of the boats and barges above referred to would have decreased for security purposes, and it is my opinion that refinancing could not have been obtained upon terms substantially different from those which I have already stated as terms of obtaining an original loan.

I have been asked also to assume that the borrower, a resident of St. Louis, Missouri, could obtain financing or refinancing
176 from banks with which he had connections, presumably in the city of St. Louis, Missouri, or any other important cities on the Mississippi River. The assumption which I have been asked to make on this score requires me to assume that the borrower had sufficient collateral, aside from the boats and barges, to obtain short-term loans, not exceeding a year at a time, from his own bankers. Upon this assumption the borrower in St. Louis could, by reason of his own credit or assets, and irrespective of the boats and barges, have borrowed money for the purpose of financing the construction of the boats and barges at interest rates generally prevailing, at the time when the financing or refinancing was to be accomplished, in St. Louis or other Mississippi Valley cities in which he may have had banking connections. With respect to such interest rates, Standard Statistics Company, in its publication, "Standard Trade and Securities—Basic Statistics—Banking and Financing," has published data compiled by the Federal Reserve Board for the years from 1919 through 1937. This data is based upon certain geographic divisions of the country. I annex hereto, as Exhibit C,

the above-described compilation of interest rates in "27 Southern and Western Cities." I am informed and believe that included in this geographic designation are the city of St. Louis, Missouri, and other important cities on the Mississippi River from Minneapolis to New Orleans. With respect to the average interest rates shown on Exhibit C, it should be noticed that they are based upon (1) commercial loans—in other words, loans of sixty to ninety days on commercial paper, (2) demand loans which, in case of banks, are short-term loans and (3) time loans on securities. Such time loans are generally made for a period
177 of six months to one year. The interest rates on commercial loans particularly, and demand loans to some extent, are less than the interest rates on time loans. The borrower interested in financing his fleet could not do so by means of a commercial loan or a demand loan. The interest payable by the borrower on a time loan would be somewhat in excess of the average interest rate stated in Exhibit C.

While, as I have stated, I do not believe that a loan on the boats and barges referred to could be made from a banking institution, nevertheless, I have been asked to assume that by reason of repayments of a substantial part of the original loan, the borrower had achieved a sufficient equity in the boats and barges so that a bank would loan some substantial sum on the basis of a lien on said boats and barges. Such loan, in my opinion, could not be obtained at the average interest rates stated in Exhibit C. The borrower would have been required to pay interest in excess of the average rates, even on a loan made for one year because the boats and barges would not constitute the type of readily saleable collateral required for bank loans and the loan would be a time loan, which, as I have stated, would have carried a higher interest rate than the commercial or demand loans which make up a part of the average interest rate stated in Exhibit C.

In my opinion, the facts which I have been asked to assume make the hypothetical loan and any refinancing thereof wholly incomparable, as respects interest rates, with municipal, state, and United States issues, high-grade corporate bonds, as well
178 as commercial and other usual bank loans, in that the interest rate on the hypothetical loan and any refinancing thereof would have been materially higher than on such securities or bank loans.

(Signed) JOHN R. DILLON.

Sworn to before me this 21st day of May 1938.

CHARLES FINKLER,
Notary Public, New York County, No. 8.

Commission expires March 30, 1939.

179 *Exhibit A—Shipping and ferries*

Date of issue	Amount issued	Obligor and coupon rate	Issuing price or yield at issuing price	House and location
Jan. 1925	$5,000,000	Munson S. S. Line 3 yr. Sec. 6s Jan. 1, 1928.	99	Harris Forbes & Co., New York; Kidder Peabody & Co., Boston.
Jan. 1925	5,000,000	Pacific Steamship Co. 1st pref. Marine Eq. 6½s 1926-45.	5-6¼	Pierce Fair & Co., San Francisco (also other houses in New York, San Francisco, Seattle, and Los Angeles.
Mar. 1925	5,000,000	Cuyamel Fruit Co. 1st 6s 1940.	99	Lehman Bros., New York (also other houses in Chicago, New York & New Orleans).
Mar. 1926 [1]	500,000	Upper Mississippi Barge Line Co. 1st 5½s 1930.	100	Lane, Piper & Jaffray Inc., Minneapolis.
Apr. 1926 [1]	3,000,000	Hudson River Navigation Corp. 1st Conv. 6½s 1951.	6.70%	F. J. Lisman & Co., New York.
Apr. 1926	1,500,000	Electric Ferries, Inc., 1st 7s 1941.	[4] 100	G. E. Barrett & Co. Inc.; Frederick Pierce & Co., Philadelphia.
Jul. 1926	1,500,000	Golden Gate Ferries, Inc., Coll. Tr. 7s A 1941.	100	E. H. Rollins & Sons. San Francisco; First Securities Co., Los Angeles.
Sep. 1926 [2]	[2] 18,000,000	Canada S. S. Lines Ltd. 1st & Gen. 6s A 1941.	97	Kissel, Kinnicutt & Co., New York (also other houses Pittsburgh, Montreal, and New York).
Nov. 1926 [2]	1,100,000	Inland Steamship Co. 1st 5½s 1928-37.	5-5½%	First Trust & Savings Bank, Chicago.
Nov. 1926	1,100,000	Golden Gate Ferries, Inc., Coll. Tr. 6½s B 1941.	99	E. H. Rollins & Sons, San Francisco; First Securities Co., Los Angeles.
Mar. 1927	210,000	Gravel Motorship Corp. (Steel Diesel Motorship Ormidale) 1st 6s 1927-35.	100	Benjamin Dansard & Co., Detroit.
Mar. 1927	1,500,000	Hudson River Day Line 1st 6s 1939.	97	Eastman Dillon & Co., New York.
Mar. 1927	1,000,000	Golden Gate Ferries, Inc., Coll. Tr. 6½s B 1941.	99	E. H. Rollins & Sons, San Francisco (also other houses Los Angeles and San Francisco).
Apr. 1927 [3]	650,000	California Transportation Co., 1st 6s 1939.	100	Anglo London Paris Co., San Francisco (also other houses San Francisco).
Aug. 1927	925,000	Baltimore Steam Packet Co. secd 5s 1930-33.	5¼-5.40%	Continental Co., Baltimore (and another).
Aug. 1927	1,000,000	Cleveland & Buffalo Transit Co. 1st Marine Eq. & Terminal 5½s A 1929-43.	5.15-5¼%	Union Trust Co., Cleveland (Marine Trust Co., Buffalo).
Sep. 1927	125,000	Mobile & Gulf Navigation Co. 1st 7s 1928-37	6-7%	Ward Stearne & Co., Birmingham.
Dec. 1927	6,000,000	Munson Steamship Line 1 yr secd. 6s Jan. 1929.	100	Harris, Forbes & Co., New York; Kidder Peabody & Co., Boston.

[1] Offering date from Poor's Cumulative Vol. 2, 1926.
[2] Offering date from Moody's Industrial Manual, 1928.
[3] Offering date from Poor's Cumulative Vol. 2, 1927.
[4] Bonus of 4 voting trust certificates representing 4 shares of common stock given with each $1,000 bond (Poor's Cumulative Vol. 2, 1926; Moody's Utilities, 1927).

180 *Exhibit B—Shipping and ferries*

Date of issue	Amount issued	Obligor and coupon rate	Issuing price or yield at issuing price	House and location
Dec. 1928	$750,000	Puget Sound Navigation Co. 1st 6s. Nov. 1, 1929-38.	100-96½	Drumheller, Ehrlichman & White, Seattle and others (on west coast).
Jan. 1929	4,500,000	Munson Steamship Line Sec. 6s. Jan. 1, 1937.	98	Harris, Forbes & Co., and others.
Jan. 1929	2,500,000	Munson Steamship Line Deb. 6½s. Jan. 1, 1937 (with stock purch. warrants).	98	Brown Bros. & Co., and another.
Apr. 1929	175,000	Leatham Smith-Putnam Navigation Co. 1st 6½s, June 1, 1938.	100	Forgan Gray & Co., Inc., Chicago, and another.
Apr. 1929	1,750,000	Pacific-Atlantic S. S. Co. 1st & Gen. Marine Eq. 6½s A. Nov. 1, 1931-37.	6.80%	Freeman & Co., and another.
May 1929	5,000,000	Southern Pacific Golden Gate Ferries Ltd. 1st 5½s, Apr. 1, 1949.	99	E. H. Rollins & Son and others.
Oct. 1929	5,000,000	Hansa Steamship Lines (Germany) 6s, Oct. 1 1939 (with stock warrants).	93	Guaranty Co. of New York.
Feb. 1930	9,400,000	Canadian Natl. (West Indies) S. S. Ltd. 5s March 1, 1955.	100	Dillon, Read & Co., and others.
Mar. 1930	600,000	Southern States Transportation Co. Conv. Deb. 7s, Dec. 1, 1939.	100	Stranahan, Harris & Oatis, Inc., and another.
May 1930	650,000	Sabine Towing Co., Inc. 6s, Sept. 1, 1930-June 1, 1934.	4.00-6.00%	Central Ill. Co.
Mar. 1931	1,650,000	Sensibar Transportation Co. 1st Mtge. Marine Eq. 6s, Mar. 15, 1943 (transportation of sand and gravel).	99	Union Cleveland Corp., and others.

181 *Exhibit C—Financing—Prevailing rates charged customers by banks in principal cities*

Page A-29

Weighted Averages. Unit: Per Cent

27 Southern and Western Cities

	Jan.	Feb.	Mar.	Apr.	May	June	July	Aug.	Sept.	Oct.	Nov.	Dec.	Avg.
1937	4.16	4.15	4.15	4.21	4.17	4.18	4.19	4.18	4.18	4.16	4.17	4.15	4.17
1936	4.47	4.51	4.44	4.40	4.43	4.39	4.35	4.25	4.29	4.22	4.23	4.14	4.34
1935	4.96	4.84	4.85	4.80	4.79	4.76	4.58	4.63	4.51	4.58	4.51	4.55	4.69
1934	5.40	5.39	5.40	5.34	5.28	5.19	5.07	5.05	5.04	5.05	4.93	4.92	5.17
1933	5.60	5.56	5.66	5.68	5.66	5.62	5.54	5.53	5.55	5.50	5.42	5.43	5.56
1932	5.61	5.61	4.64	5.63	5.64	5.62	5.63	5.68	5.63	5.56	5.55	5.60	5.62
1931	5.50	5.43	5.40	5.36	5.26	5.34	5.30	5.20	5.32	5.38	5.53	5.56	5.39
1930	6.12	6.05	5.98	5.86	5.75	5.69	5.63	5.58	5.55	5.54	5.50	5.43	5.72
1929	5.94	5.96	6.04	6.07	6.10	6.16	6.17	6.22	6.27	6.29	6.29	6.20	6.14
1928	5.53	5.53	5.54	5.54	5.56	5.67	5.77	5.80	5.82	5.87	5.90	5.91	5.70
1927	5.72	5.71	5.65	5.57	5.59	5.54	5.52	5.53	5.61	5.56	5.56	5.60	5.60
1926	5.56	5.65	5.62	5.65	5.61	5.55	5.54	5.56	5.60	5.66	5.67	5.68	5.64
1925	5.57	5.55	5.61	5.61	5.58	5.59	5.59	5.60	5.58	5.53	5.55	5.61	5.58
1924	6.02	5.91	5.89	5.89	5.79	5.69	5.63	5.57	5.55	5.47	5.53	5.53	5.71
1923	5.90	5.91	5.81	5.94	5.92	5.91	5.96	5.98	5.94	5.95	5.99	5.99	5.94
1922	6.86	6.46	6.35	6.22	6.23	6.13	6.04	6.02	5.94	5.89	5.94	5.90	6.14
1921	7.10	7.11	7.13	7.09	7.06	7.05	7.04	7.03	6.96	6.85	6.74	6.67	6.99
1920	6.16	6.26	6.43	6.47	6.56	6.88	7.00	6.99	7.07	7.04	7.08	7.07	6.75
1919	6.11	6.03	6.02	6.01	6.00	5.91	5.98	5.94	5.98	5.96	5.96	6.10	6.00

NOTE.—Figures relate to rates charged by reporting banks to their own customers as distinguished from open-market rates. All averages are based on rates reported for three types of customer loans—commercial loans, and demand and time loans on securities. The method of computing the averages takes into account (a) the relative importance of each of these three types of loans and (b) the relative importance of each reporting bank, as measured by total loans. In the two group averages the average rate for each city included is weighted according to the importance of that city in the group, as measured by the loans of all banks.

Source of data—Federal Reserve Board.

182 *Defendants' Exhibit A-36*

The prevailing interest rates during the period in question, as compiled by the Federal Reserve Board, are as follows:

Year	Prevailing rate on prime commercial paper, 4-6 months (Federal Reserve Board)	Average yield on high-grade corporate bonds (Moody's Investors service)	United States Government Bonds [1]	Municipal Bonds (high grade) [2]
1919	5.56	5.48	4.62	4.45
1920	7.54	6.12	5.32	4.98
1921	6.56	5.98	5.09	5.09
1922	4.48	5.12	4.30	4.23
1923	5.01	5.12	4.36	4.25
1924	3.88	5.00	4.06	4.20
1925	4.03	4.88	3.86	4.09
1926	4.34	4.73	3.68	4.08
1927	4.11	4.57	3.34	3.98
1928	4.86	4.55	3.33	4.05
1929	5.85	4.73	3.60	4.27
1930	3.59	4.55	3.28	4.07
1931	2.63	4.65	3.31	4.02
1932	2.73	5.01	3.68	4.65
1933	1.72	4.49	3.31	4.71
1934	1.03	4.00	3.10	3.95
1935	.76	3.60	2.70	3.16
1936	.75	3.25	2.47	2.68

[1] Yields on bonds due or callable after 8 years, compiled by United States Treasury Department.
[2] Compiled by Standard Statistics Co.

183 In the Court of Claims of the United States

No. 42696

KATE B. GOLTRA AND E. FIELD GOLTRA, JR., EXECUTORS OF THE ESTATE OF EDWARD F. GOLTRA, DECEASED

vs.

THE UNITED STATES

Clerk's certificate

I, Willard L. Hart, Chief Clerk, Court of Claims of the United States, certify that the annexed stipulation as to record on cross-appeal and petition for certiorari by plaintiff (paged from 1 to 26, inclusive) in the above-entitled case is a true copy of the original on file in this office by leave of court.

In testimony whereof I have hereunto set my hand and affixed the seal of said court at Washington City this 29th day of June A. D., 1940.

[SEAL] WILLARD L. HART,
Chief Clerk Court of Claims of the United States.

184 In Supreme Court of the United States

No. 191

Statement of points relied upon and designation of record for printing

Filed July 3, 1940

Pursuant to Rule 13, paragraph 9 of this Court, the appellant states that it intends to rely upon all of the points in its Assignment of Errors.

The appellant deems the entire record, as filed in the above-entitled cause, necessary for the consideration of the points relied upon.

FRANCIS BIDDLE,
Solicitor General.

Service acknowledged 2nd day of July, 1940.

HERMAN J. GALLOWAY,
Counsel for appellee.

July 1940.

[File endorsement omitted.]

185 In Supreme Court of the United States

No. 192

Statement of points and designation of record pursuant to rule 13

Filed June 29, 1940

Come now Kate B. Goltra and E. Field Goltra, Jr., Executors of the Estate of Edward F. Goltra, deceased, cross-applicants herein and file the following statement of points upon which they intend to rely and the following designation of parts of the record deemed necessary for the consideration thereof.

186 I

POINTS

A. The Court of Claims erred as a matter of law in failing to make findings covering the subject matter of each of the requested special findings of fact set out in subdivisions A through J, both inclusive, of Item I of the Assignment of Errors herein.

B. An offer made by Standard Oil Company of Louisiana to rent the Goltra fleet should have been considered by the Court of Claims in determining the amount of recovery.

C. The net reasonable market rental value of the Goltra fleet should have been considered by the Court of Claims in determining the amount of recovery.

D. The amount which the Goltra fleet could and would have earned, but for the taking thereof by the United States, as measured by the rental value of the fleet should have been considered by the Court of Claims in determining the amount of recovery.

E. The market value of the original and supplemental contracts between Goltra and the United States should have been considered by the Court of Claims in determining the amount of recovery.

F. In the event that this Court shall conclude upon the appeal of the United States herein that in determining the amount
187 of recovery the Court of Claims should not have adhered to the usual measure of just compensation, but should have measured the recovery on the basis of legal damages, then the Court of Claims should have considered loss of prospective profits to Goltra by reason of the taking of the fleet and should have considered the reasonable rental value of the fleet, its earn-

ing capacity as measured by rental value, as well as the offer to rent the fleet made by Standard Oil Company of Louisiana.

G. The amount of recovery allowed by the Court of Claims is inadequate as a matter of law.

II

DESIGNATION OF RECORD

All parts of the record heretofore filed on this cross-appeal are deemed necessary for a consideration of the foregoing points of law and it is respectfully requested that such record be printed by the Clerk of this Court.

Respectfully submitted.

HERMAN J. GALLOWAY,
FREDERICK W. P. LORENGEN,
Attorneys for Cross-Appellants.

To the SOLICITOR GENERAL OF THE UNITED STATES, *Counsel for Cross-Appellee:*

You are hereby notified that a Statement of Points and Designation of Record Pursuant to Rule 13 in the above entitled cause was filed in the Supreme Court of the United States on the 29th day of June 1940, a copy thereof is served upon you herewith.

HERMAN J. GALLOWAY,
Counsel for Cross-Appellants,
728 17th Street NW., Washington, D. C.

Service accepted this 1st day of July 1940.

FRANCIS BIDDLE,
Solicitor General, Counsel for Respondent,
Department of Justice, Washington, D. C.
per W. M. S.

[File endorsement omitted.]

[Endorsement on cover:] Enter Attorney General in 191. File No. 44540, 44541. Court of Claims. Term No. 191 and 192. No. 191. The United States, Appellant vs. Kate B. Goltra and E. Field Goltra, Jr., Executors of the Estate of Edward F. Goltra, Deceased. No. 192. Kate B. Goltra and E. Field Goltra, Jr., Executors of the Estate of Edward F. Goltra, Deceased, Appellants vs. The United States. Appeals from the Court of Claims. Filed June 29, 1940. Term No. 191 O. T. 1940, 192 O. T. 1940.

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No. 191

In the Supreme Court of the United States

OCTOBER TERM, 1940

THE UNITED STATES, APPELLANT

v.

KATE B. GOLDEN AND E. FIELD GOLDEN, JR., EXECUTORS OF THE ESTATE OF EDWARD T. GOLDEN, DECEASED

APPEAL FROM THE COURT OF CLAIMS

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APPEALS FROM THE COURT OF CLAIMS

XIII. STATEMENT AS TO JURISDICTION

(Filed June 19, 1940)

In compliance with Rule 12 of the Supreme Court of the United States, the United States herewith submits its statement showing the basis of the jurisdiction of the Supreme Court of the United States to entertain an appeal in this case. The judgment sought to be reviewed is dated April 1, 1940.

The statutory jurisdiction of the Supreme Court to review by direct appeal the judgment complained of is conferred by Private Act No. 69 of

243860—40——1

April 18, 1934, 48 Stat. 1322, which provides as follows:

> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That jurisdiction is hereby conferred upon the Court of Claims of the United States, whose duty it shall be, notwithstanding the lapse of time or the bar of any statute of limitations or previous court decisions, to hear, consider, and render judgment on the claims of Edward G. Goltra against the United States for just compensation to him for certain vessels and unloading apparatus taken, whether tortiously or not, on March 25, 1923, by the United States under orders of the Acting Secretary of War, for the use and benefit of the United States; and any other legal or equitable claims arising out of the transactions in connection therewith: *Provided,* That separate suits may be brought with respect to the vessels and the unloading apparatus, but no suit shall be brought after the expiration of one year from the effective date of this Act: *Provided further,* That either party may appeal as of right to the Supreme Court of the United States from any judgment in said case at any time within ninety days after the rendition thereof, and any judgment rendered in favor of the claimant shall be paid in the same manner as other judgments of said Court of Claims are paid.

The act in question, which provides "that either party may appeal as of right to the Supreme Court of the United States from any judgment in said case at any time within ninety days after the rendition thereof," clearly confers the right of direct appeal. Moreover, the legislative history of the act in question indicated that such language was not inadvertently used for the purpose of authorizing the ordinary review by writ of certiorari.[1]

A bill conferring jurisdiction upon the Court of Claims to hear and determine the claim of Goltra, H. R. 6425, 72d Congress, was introduced in the House with the provision that either party "may appeal to the Supreme Court of the United States." The bill was amended by the Judiciary Committee which inserted after the word "appeal" the words "as of right."[2] H. Rept. 1426, 72d Cong., 1st Session. No action was taken on that bill. In the 73d Congress, an identical bill (H. R. 4398) was introduced to confer jurisdiction upon the Court of Claims to pass upon Goltra's claim. This bill was accompanied by House Report 828, 73d Congress, which contained in full House Report 1426 of the 72d Congress. H. R. 4398 was laid on the table when a similar bill, which had been introduced in the Senate (S. 1091), was called up and passed in

[1] The United States, out of abundant precaution, is filing a petition for a writ of certiorari in the instant case.

[2] The Committee report does not comment on this change in language. A fair conclusion is that the amendment was regarded to be so plain as to require no comment.

the House. Cong. Rec. 73d Cong., 2d Sess., p. 6585. The bill had been before the Senate Judiciary Committee. It must be assumed that the judiciary committees of both houses were aware of the fact that the language they used authorizing an appeal as of right related to a technical appeal and not to the ordinary review by certiorari. *Cf. Colgate* v. *United States,* 280 U. S. 43, 47. The act as passed therefore must likewise be assumed to confer the right of appeal in the technical sense and not the discretionary review by writ of certiorari which would otherwise obtain.

The following cases are believed to sustain the jurisdiction of the Supreme Court: *Ex parte Atocha,* 17 Wall. 439, 444; *Vigo's Case,* 21 Wall. 648, 651; *Colgate* v. *United States,* 280 U. S. 43, 47.

NATURE OF THE CASE AND THE RULING BELOW

In 1919, the United States, acting through the Chief of Engineers, United States Army, leased to Edward F. Goltra a fleet of tugs and barges to be operated as a common carrier on the Mississippi River and its tributaries. The fleet was delivered to Goltra in July 1922. The contract contained a provision empowering the Chief of Engineers, as lessor, to terminate the contract at any time that, in his judgment, the lessee failed to comply with the terms and conditions of the agreement. Certain dissatisfaction arose as to the manner in which the operation of the enterprise was being conducted. On March 3, 1923, the Secretary of War

advised Goltra that, in his judgment, Goltra had not complied with the terms of the contract and that the contract was canceled. A request for the return of the vessels to the Government was refused. On March 25, 1923, by direction of the Secretary of War, the vessels were seized by certain Army officers. Thereafter, in April 1923, the Chief of Engineers notified Goltra that he had determined that Goltra was in default and that the contract was canceled.

Goltra brought suit against the Secretary of War and other officials of the Army seeking to enjoin the seizure of the vessels. The District Court issued an injunction and ordered the return of the vessels. On appeal, the Circuit Court of Appeals for the Eighth Circuit reversed. The Supreme Court of the United States affirmed on the ground that the contract had been terminated by the Chief of Engineers in accordance with the terms thereof. *Goltra* v. *Weeks*, 271 U. S. 536.[3]

By a private act of Congress, jurisdiction was conferred upon the Court of Claims to hear, determine, and enter judgment upon the claim of Goltra for just compensation for the seizure of the vessels. The United States defended on the ground that the action of the Chief of Engineers, in making a finding that the contract had been breached, was final

[3] Other reported cases relating to the cancellation of the contract and the seizure of the vessels are: *Goltra* v. *Davis*, 29 F. (2d) 257 (C. C. A., 8th), and *Goltra* v. *Inland Waterways*, 49 F. (2d) 497 (App. D. C.).

and not subject to judicial review. The Court of Claims found that the Chief of Engineers did not exercise his independent judgment in terminating the contract, but was coerced into his action by the Secretary of War. It accordingly held that—

> The Secretary of War had no authority under the contract to exercise the right conferred upon the Chief of Engineers and, until the Chief of Engineers had cancelled the contract, the action of the Secretary of War, in cancelling the contract, was *ultra vires,* and the action of the Acting Secretary of War in ordering the seizure of the fleet by Colonel Ashburn was a tortious act. * * *
>
> The plaintiff having been deprived of his lease and option to purchase, illegally and wrongfully, the question arises as to what compensation he shall receive.

It is thus clear that the Court of Claims concluded that the contract was wrongfully terminated, and that the seizure of the vessels was a tortious act and a breach of the Government's obligations under the contract.

The Court of Claims apparently conceiving that the language of the act either authorized or compelled it so to do, awarded interest from the time of the taking, and concluded its opinion with the following language:

> Judgment is entered for the plaintiffs in the sum of $350,000, with interest at 6 per cent per annum, not as interest but as part

of just compensation, from March 25, 1923, to the date of payment. *Virginia Engineering Company* v. *United States,* 89 C. Cls. 457.

On April 1, 1940, it accordingly entered judgment for Goltra in the sum of $350,000 with interest thereon from March 25, 1923, to date of payment. It is to the part of the judgment awarding interest that the United States now specifically excepts.

THE QUESTION IS ONE OF SUBSTANCE.

Section 177 of the Judicial Code, with certain exceptions not here pertinent, prohibits the Court of Claims from allowing interest prior to the entry of judgment except upon a claim based upon a contract expressly stipulating for the payment of interest. It has been consistently held that recovery of interest against the United States cannot be had unless expressly authorized by contract or by special act of Congress. *Boston Sand Co.* v. *United States,* 278 U. S. 41; *Cherokee Nation* v. *United States,* 270 U. S. 477, 487; *District of Columbia* v. *Johnson,* 165 U. S. 330, 338; *United States* v. *North Carolina,* 136 U. S. 211. The rule is strictly applied and courts proceed on the assumption that Congress will clearly specify the allowance of interest if it so intends. *United States* v. *North American Co.,* 253 U. S. 330, 336; *Tilson* v. *United States,* 100 U. S. 43, 46. The rule has been held to be comparable to sovereign immunity to suit and to statutes of limitations. *United States* v. *Verdier,* 164 U. S. 213, 219. Cases involving a taking for public use

have no application. This case did not in any sense involve a taking for public use. The Court of Claims specifically stated that the seizure of the vessels was tortious and that the contract was wrongfully and unlawfully terminated. Even as between private parties, interest would not be allowable in such circumstances.

Moreover, recent decisions of the Court of Claims are conflicting on the question of the allowance of interest where a special act confers jurisdiction to enter judgment upon a claim for just compensation or to award just compensation upon a claim. In *Squaw Island Freight Terminal Co.* v. *United States,* 89 C. Cls. 269, the court refused to allow interest under a special act conferring jurisdiction upon it to render judgment on the claim for just compensation. The language there employed was identical to that used in the present case. In *Virginia Engineering Company* v. *United States,* 89 C. Cls. 457, where the language of the special act provided that the Court of Claims award just compensation and to enter judgment therefor, it allowed interest. The opinion in the instant case makes no effort to reconcile these conflicting decisions, nor does the decision of the Court of Claims in any of the three cases rest upon a distinction in the language employed.

The question as to whether the United States should respond in damages including interest, merely because of the presence of the term "just compensation" in some form in a special act, is one

of substantial importance. The decision in the instant case makes a departure from earlier decisions which hold that interest may not be allowed under special acts unless provided for in clear and express language. It should not be allowed to stand unless expressly approved by the Supreme Court.

There is appended hereto a copy of the special findings of fact, conclusion of law and opinion of the Court of Claims entered April 1, 1940.

Respectfully submitted.

FRANCIS BIDDLE,
Solicitor General.

243860—40——2

ACCOMPANYING PETITION FOR APPEAL TO THE SUPREME COURT OF THE UNITED STATES

In the Court of Claims of the United States

No. 42696

(Decided April 1, 1940)

KATE B. GOLTRA AND E. FIELD GOLTRA, JR., EXECUTORS OF THE ESTATE OF EDWARD F. GOLTRA, DECEASED

v.

THE UNITED STATES

Mr. Herman J. Galloway for the plaintiffs. *Messrs. Richard E. Dwight, Frederick W. P. Lorenzen,* and *Dwight, Harris, Koegel & Caskey* were on the briefs.

Mr. Alexander Holtzoff, with whom *Mr. Assistant Attorney General Francis M. Shea,* for the defendant. *Mr. Herbert A. Bergson* was on the brief.

This case having been heard by the Court of Claims, the court, upon the evidence and the report of a commissioner, makes the following

SPECIAL FINDINGS OF FACT

1. Edward F. Goltra, the original plaintiff in this suit, at all times herein pertinent, was a citizen

of the United States and a resident of St. Louis, Missouri.

Since the institution of this suit, Edward F. Goltra on April 2, 1939, departed this life, leaving as his executors Kate B. Goltra and E. Field Goltra, Jr., who have been substituted as plaintiffs. Wherever the word "plaintiff" is used herein, reference is made to Edward F. Goltra and not the executors.

2. The petition herein was filed July 21, 1934, pursuant to Private Act approved by the President on April 18, 1934, as follows:

AN ACT

Conferring jurisdiction upon the Court of Claims of the United States to hear, consider, and render judgment on the claims of Edward F. Goltra against the United States arising out of the taking of certain vessels and unloading apparatus.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That jurisdiction is hereby conferred upon the Court of Claims of the United States, whose duty it shall be, notwithstanding the lapse of time or the bar of any statute of limitations or previous court decisions, to hear, consider, and render judgment on the claims of Edward F. Goltra, against the United States for just compensation to him for certain vessels and unloading apparatus taken,

whether tortiously or not, on March 25, 1923, by the United States under orders of the Acting Secretary of War, for the use and benefit of the United States; and any other legal or equitable claims arising out of the transactions in connection therewith: *Provided,* That separate suits may be brought with respect to the vessels and the unloading apparatus, but no suit shall be brought after the expiration of one year from the effective date of this Act: *Provided further,* That either party may appeal as of right to the Supreme Court of the United States from any judgment in said case at any time within ninety days after the rendition thereof, and any judgment rendered in favor of the claimant shall be paid in the same manner as other judgments of said Court of Claims are paid.

3. In the year 1917, after this country had entered the World War, traffic conditions in the Mississippi Valley became acute because of the inadequacy of rail transportation facilities, and defendant investigated the feasibility of developing river transportation facilities. Plaintiff, in cooperation with defendant, at his own risk and expense, conducted practical experiments as to the commercial feasibility of transporting coal from St. Louis to St. Paul and iron ore in the reverse direction by means of barges on the Mississippi River, and also conducted an experimental trip carrying knocked down ballast cars on barges from St. Louis to New Orleans to be sent to the armies

of defendant in France. As a result of these experiments the engineers of the Corps of Engineers of the Army obtained information necessary in order to prepare specifications and designs for a fleet of barges for operation on the Mississippi River. Plaintiff reported the results of these experiments to the President of the United States and asked that defendant give financial aid in defraying the cost of building a fleet such as is described in the next finding. Plaintiff offered to take over the vessels when completed, operate them, and reimburse the Government for the cost thereof in any fair manner.

4. Thereafter, as a wartime measure, defendant entered into contracts for the construction of 19 steel barges and planned the construction of 4 steel towboats to tow the barges. The barges and towboats were later built and became the property of defendant.

5. On March 1, 1919, plaintiff sent a letter to the Secretary of War relating to these boats and barges. In that letter he recited facts with respect to his efforts on the Mississippi River in 1917 substantially as stated in Finding 3 and concluded as follows:

> As the whole project will now before long be consummated, I desire to enter into an agreement for the operating and taking over of the whole project. In view of the fact that it has been generally understood that I was to take over the facilities, I have been

preparing myself by acquiring the necessary fuel properties and ore properties and real estate for the terminal facilities, and I feel that I should no longer be left without an agreement reduced to writing covering this matter.

I respectfuliy refer you to your letter of the 25th of October 1917, addressed to Mr. E. N. Hurley, and also your letter of December 13, 1918, addressed to the Emergency Fleet Corporation, and to say in conclusion modestly as I can, that the entire inland waterway traffic matter took on form and substance as the direct result of the work I did on the Mississippi River in the Spring and Summer of 1917, and that the Inland Waterways Commission was an afterthought and result of said activities and was formed long after the moral obligation at least, of turning over these vessels to me was entered into.

6. On May 28, 1919, plaintiff and defendant entered into a contract (hereinafter referred to as the "original contract"), and on May 26, 1921, plaintiff and defendant supplemented the original contract by a contract (hereinafter referred to as the "supplement contract"). Both these contracts were prepared and drafted by the defendant, and were signed by the Chief of Engineers as party of the first part and by the plaintiff as party of the second part. A copy of the original contract is Exhibit B to the petition and a copy of the supplemental contract is Exhibit C to the petition and both are made a part of these findings by reference.

7. At all times herein pertinent and material, there was stationed at St. Louis an officer of the corps of engineers of the United States Army called "District Engineer." Among the functions of this officer was the duty of representing the Chief of Engineers in connection with the performance by the respective parties of the original contract and the supplemental contract and in supervising plaintiff's performance of the contracts.

8. From the year 1920 a fleet of barges and towboats known as the "Mississippi Warrior Service" has been operated in the transportation of freight as a common carrier on the Mississippi River between St. Louis and New Orleans and on the Warrior River. From 1920 to about June 1924 the Mississippi Warrior Service was conducted as one section of a division in the War Department known as the Inland and Coastwise Waterways Service, and from about June 1924 until the present time it has been conducted by Inland Waterways Corporation, a corporation organized under chapter 243 of the Act of Congress of June 3, 1924 (43 Stat. 360, 49 U. S. C. 151–6), the stock of which has at all times been wholly owned by defendant. At all times herein pertinent and material, the Mississippi Warrior Service was permitted by defendant to carry and did carry practically all classes of the more common freight available for transportation on the Mississippi River at rates of 80 percent of the prevailing rail rates.

9. On March 2, 1921, plaintiff sent a letter to the Chief of Engineers as follows:

> I am asked by various river cities to quote a definite rate to them for transportation of commodities by means of the boats and barges being constructed under my government contract. The different municipalities are in the process of installing terminal facilities and find that it is necessary to have definitely set forth by the Secretary of War what rates they may expect.
>
> I respectfully suggest that I be authorized to quote them the same rates as obtained on the Government Barge Line now operating on the lower river, viz—80% of the all-rail rates that now obtain.
>
> Will you be good enough, if you approve of my suggestion, to communicate with the Secretary of War, notifying him of same.

The "Government Barge Line" referred to in this letter was the Mississippi Warrior Service. On March 3, 1921, the Acting Chief of Engineers sent a letter to the Secretary of War which contains the following:

> It is represented by the lessee that it would be advantageous to the operation of the vessels if the rates of transportation should be fixed at 80 percent of the prevailing rail tariffs. These are the rates charged on the government line now operating below St. Louis, and in my opinion it would be in the interest of the shipping public to permit the same rates to be charged on this line. I

> accordingly recommend that the Secretary of War give his consent thereto.

On March 4, 1921, the Secretary of War gave his consent under the original contract to plaintiff's operation of the barges and towboats at rates less than the prevailing rail tariffs, i. e., 80 percent thereof. On or about March 10, 1921, plaintiff received from the office of the Chief of Engineers notification of such consent, and on or about March 14, 1921, he received from the District Engineer a copy of the letter of March 3, 1921, and the Secretary of War's endorsement thereon.

10. In the latter part of March 1922 plaintiff notified the Chief of Engineers that he was exercising his option to purchase the barges, towboats and unloading facilities, that he had appointed an appraiser for that purpose, and that he desired the Chief of Engineers to appoint another appraiser. The Chief of Engineers, April 1, 1922, refused to appoint another appraiser at that time on the ground that the terms of the lease had not yet begun to run.

11. On March 31, 1922, the Secretary of War sent a letter to plaintiff as follows:

> I am told there was recently an interview in the St. Louis Post-Dispatch in which you stated I had authorized you to make rates on the lower Mississippi at eighty percent of the railroad rates. I have not seen the interview so I am not clear that what I have stated is definitely correct. But in any case,

I told you at the time I could not authorize or approve any operation on the lower Mississippi that would enter into competition with the established line of barges. This line is operated for a definite purpose and should not be interfered with in that operation by any action of the Government.

I said if there was freight on the lower Mississippi which could not be handled by the present operating line and it could be transported by your barges, in that case I would authorize a rate of eighty percent of the railroad rate. In making this statement I was assuming that what you told me—that the present line could not handle the material which you mentioned—is a fact; but any rate charged must be agreed to by General Downey and the operators of the present line.

Your contract calls for a rate not less than the railroad rate without the approval of the Secretary of War and I shall give no approval which does not carry out this general statement.

The barge line referred to in this letter was the Mississippi-Warrior Service. At the time when the letter was written, General Downey, referred to therein, was Chief of the Inland and Coastwise Waterways Service. The letter was released to the newspapers prior to the receipt thereof by plaintiff and was quoted in an article which appeared in the St. Louis Post-Dispatch on April 2, 1922, under a Washington date line bearing the date April 1.

12. On April 18, 1922, plaintiff had a meeting with the Secretary of War in Washington and at that time insisted that he had in writing been given the right to operate the barges and towboats at 80 percent of the full rail rates. The Secretary of War denied that plaintiff had a right to operate the barges and towboats at less than the full rail rates and stated that the delivery of the barges and towboats to plaintiff should be postponed until the Secretary of War had obtained legal advice with respect to plaintiff's rights.

13. Before the meeting with the Secretary of War on April 18, 1922, plaintiff went to the office of the Interstate Commerce Commission to arrange for filing certain barge line rates to be effective when the barges and towboats should be delivered to him, and after the meeting with the Secretary of War an official of the Interstate Commerce Commission informed plaintiff that he could not file his rates as long as the Secretary of War asserted the right to control plaintiff's rates.

14. On May 6, 1922, the Secretary of War sent a letter to plaintiff as follows:

> You are hereby notified that under the provisions of paragraph 2 (a) of the certain contract #E7076 between yourself and Major General William M. Black, Chief of Engineers, United States Army, dated May 28, 1919, as supplemented by an amendment thereto dated May 26, 1921, the consent and approval of the Secretary of War heretofore, on the 4th day of March 1921, given to

the operation by you of the vessels covered by and included under the provisions of said contract, at transportation rates equal to 80% of the prevailing rail tariffs, is hereby withdrawn and cancelled as to any and all contracts, agreements or undertakings for transportation on the Mississippi River and its tributaries below the City of Saint Louis, Missouri, hereafter made and entered into by you.

From and after this date you are authorized to operate said vessels on the Mississippi River and its tributaries below the said City of Saint Louis, only at transportation rates equal to and not less than the prevailing rail tariffs, save and except in such cases, and as to such transactions and commodities as the Secretary of War shall, upon application to him, have previously specifically consented to and approved.

On May 25, 1922, the Secretary of War sent a letter to plaintiff, the body of which is in part as follows:

In compliance with the terms of my letter of May 6, 1922, you are hereby authorized to transport the following articles from port to port on the Mississippi River or its tributaries at not less than 80% of the all-rail rates:

Liquids in bulk, including liquid asphalt or road oil, in drums; coal, lumber, sulphur, ties, cement, salt, sand, gravel, crushed rock; and grain over and above the capacity of the Mississippi-Warrior Service to handle such commodity.

Due to the conditions limiting the amount of grain which may be handled through New Orleans, and due to the limited elevator capacity at Cairo and St. Louis, you will be required to obtain from Mr. Theodore Brent, Federal Manager, Mississippi-Warrior River Service, or his representative in St. Louis, Mr. J. P. Higgins, the amount of grain you may carry and specific dates upon which you can carry it.

15. On July 15, 1922, defendant delivered to plaintiff at St. Louis the 19 barges and 4 towboats.

The towboats delivered to the plaintiff were in all respects identical. Each was of the stern-paddle wheel type, equipped with a coal-burning steam engine rated at approximately 2,000 horsepower, was of 300-foot length over all, 58-foot beam and 10-foot depth of hold, and had a draft of approximately 4 feet with a light load of fuel and of approximately 5½ feet with a usual load of fuel.

The barges, when delivered to plaintiff, were in all respects identical and each was of steel construction with a spoon-shaped bow especially designed for easy towing. Each of the barges was of 300-foot length, 48-foot beam, and 10-foot depth of hold, having a draft of approximately 19 inches when light, and a draft of 9 feet with a maximum load of 3,000 tons. Each of the barges had a double bottom and sides which, together with bulkheads, created 22 water- and oil-tight compartments between the outer and inner shells for carrying of all kind of liquid cargoes, including crude

oil and its derivative products; and each of the barges was completely equipped for loading and unloading liquid cargo by means of a 6-inch pipe system. Each of the barges also had an open cargo hold suitable for carrying materials or commodities not requiring protection from the weather. None of the barges was equipped to carry grain or other perishable commodities, but they could have been converted into barges capable of carrying such commodities by the construction of covers, roofs, or cargo boxes thereon. The barges were the most advanced in type of any river barge constructed and up to the present time are the only barges of this type on the Mississippi River.

16. Soon after the delivery of the fleet, it was discovered that the firing mechanism of the towboats was inefficient, and plaintiff, in order to remedy this condition, installed oil-burning equipment on the towboat *Illinois*. This change proved effective.

17. On August 7, 1922, immediately after the oil-burning equipment had been installed on the towboat *Illinois,* plaintiff, with the approval of the District Engineer, caused this towboat and several of the barges to depart from St. Louis for Caseyville, Kentucky, situated on the Ohio River, to carry coal which had been offered to plaintiff for transportation from Caseyville, Kentucky, to the vicinity of St. Louis. The towboat *Illinois* and four of the barges returned to St. Louis on September 9, 1922. On the trip to and from Casey-

ville, the towboat *Illinois* carried a very light load of fuel, and the barges were empty on the way to Caseyville and loaded light to but a small fraction of their capacity on the return trip. The operation of the towboat and barges on the trip to and from Caseyville was interfered with by the very low water, groundings, and delays occasioned by the necessity of waiting for dredges to clear crossing and dredging necessary beneath the coal tipple at Caseyville. During this trip mechanical breakdowns of the towboat *Illinois* occurred and gener. repairs and alterations were made on this towboat.

Experience on the trip to Caseyville and return indicated the necessity or desirability of making certain additions and changes on the towboat *Illinois* for its efficient operation and they were made between September 9, 1922, and September 26, 1922, by plaintiff's employees after the return of this towboat to St. Louis.

On September 26, 1922, plaintiff, with the approval of the District Engineer, caused the towboat *Illinois* and certain of the barges to depart for Hannibal, Missouri, to load a cargo of cement which the district office of the Corps of Engineers of the United States Army at Cincinnati, Ohio, wished to have transported to that point. The towboat *Illinois* and the barges experienced great difficulty on the trip to Hannibal by reason of extremely low water and the barges were loaded with cement at Hannibal to but a small fraction of their capacity. Nevertheless, the towboat and the barges

experienced great difficulty by reason of low water on the trip from Hannibal to East St. Louis, Illinois. At the latter point plaintiff was advised that by reason of low water it would be impossible to navigate on the Ohio River, and the Corps of Engineers at Cincinnati ordered plaintiff to unload the cargo of cement at East St. Louis for shipment by rail to Cincinnati. The towboat *Illinois* also experienced mechanical trouble on this trip, and repairs were made during the trip by plaintiff's employees. The towboat *Illinois* returned to the plaintiff's docks in St. Louis on October 14, 1922.

From October 14, 1922, until the end of November 1922, the towboat *Illinois* was tied up at plaintiff's docks in St. Louis with steam up and crew on board ready to tow any of the barges. While the towboat was so tied up further additions, changes, and repairs which were necessary or desirable for its efficient operation were made by plaintiff's employees.

Plaintiff did not operate the other three towboats during the period from July 15, 1922, to December 1, 1922.

18. About December 1, 1922, the plaintiff, with the approval and consent of the District Engineer, caused the barges and towboats to be placed in winter quarters where plaintiff expected to keep them until navigation could safely be resumed in 1923. For many years prior thereto it was customary at St. Louis to place commercial barges and towboats into winter quarters about December 1st and leave

them there until sometime in March, in order to protect them from damage from ice and other winter elements. During this period it was unsafe to take such vessels out of winter quarters even though the river might be free of ice because of the risk of injury due to sudden changes in the weather.

19. On December 13, 1922, Colonel Ashburn, Chief of the Inland and Coastwise Waterways Service, of which the Mississippi-Warrior Service was a section, sent a letter to plaintiff, as follows:

> On May 25, 1922, you were authorized to carry certain articles on the Mississippi River and its tributaries at not less than 80% of the all rail rates. Amongst them was "grain over and above the capacity of the Mississippi-Warrior Service to handle such commodity."
>
> The Secretary of War now authorizes you to carry any and all grain at not less than 80% of the all-rail rates that you can secure, regardless of the capacity of the Mississippi-Warrior Service to handle such commodity, and without any further action on your part being necessary. Please acknowledge the receipt of this letter.
>
> It is to be hoped that you will cooperate with the Mississippi-Warrior Service in your grain operations to such an extent that neither you nor they will be handicapped by the grouping of a number of barges at New Orleans loaded with grain which cannot be discharged promptly.

A copy of this communication has been sent to the Grain Dealers Association of St. Louis, to Mr. Brent, and to the District Engineer Officer in St. Louis, for their information and guidance.

At the time when this letter was written, Colonel Ashburn and defendant knew that the barges and towboats were in winter quarters from which they could not then be removed without serious danger of injury, and that the barges were not then equipped to carry grain.

20. On January 5, 1923, the Secretary of War sent a memorandum to the Chief of Engineers as follows:

1. I am returning the audit of the accounts of the Goltra Barge Line for the period July 15th–October 15, 1922, with memoranda from the Chief of Inland and Coastwise Waterways Service and from the Judge Advocate General attached thereto for your consideration.

2. According to the view of the Judge Advocate General, we cannot annul the contract at this time with impunity. Suitable instructions should, therefore, be given the District Engineer at St. Louis that all future reports of operation will include the information necessary to clearly establish the right of the Government to take such action in the event of the failure of the lessee to carry out the terms of the contract.

3. You will inform Mr. Goltra that it is the view of the War Department that the

fleet should be operated to the maximum, and failure to operate, if practicable, is a violation of the contract.

On January 16, 1923, the chief legal adviser to the Chief of Engineers submitted a memorandum to the Chief of Engineers, of which a paragraph reads as follows:

> If Mr. Goltra carried all of the freight offered him during the period, or up to the capacity of his barge line, then he has fully complied with the contract, and if he was ready at all times to carry freight of the kind contemplated by the contract which might be offered him, he would then be within the terms of his contract although none or very little might be offered, nor would the contract compel him to operate the fleet if the physical conditions on the river render it impracticable to do so.

On January 19, 1923, the Assistant Chief of Engineers forwarded to the District Engineer a draft of letter to be signed by the District Engineer and delivered to the plaintiff in accordance with the instructions of the Secretary of War. This letter was delivered to plaintiff by the District Engineer on January 29, 1923. The letter reads as follows:

> The Secretary of War has received a number of communications from commercial organizations interested in transportation on the Mississippi River complaining of the inactivity of the fleet of barges and towboats

leased by you from the Government. He has also had under consideration my report of the audit of accounts of the operation of this fleet as made to October 15, 1922. This report, as you are aware, indicates a but limited movement of trade during the past season.

The Secretary is not satisfied that the operation of the fleet has been as adequate and as vigorous as the last contract of May 28, 1919, contemplates and requires.

The Secretary of War has therefore directed that you be informed that it is the view of the Department that during the period when navigation is practicable the fleet should be operated to the maximum and that failure to so operate it will be regarded as a violation of the contract.

21. Prior to the delivery to him of the letter dated January 19, 1923, plaintiff had, on January 15, 1923, sent a letter to the District Engineer requesting that certain dredging be done in the Mississippi River in front of the unloading facilities to enable barges to get into position for loading and unloading. The letter contained the following:

We propose to begin operating the fleet as soon as the season opens, bringing in coal, ore, and other commodities, and I respectfully request that the dipper dredge which has been in this section and is now at work at Commerce, be detailed to do this dredging, in order to put the channel in shape, as soon as it completes the work upon which it is engaged at present.

> While it will only take it a short time to do this work, nevertheless, February will soon be here and over, and we ought to be in position to start the fleet by the first of March, unless ice prevents.

22. While the towboats and barges were in winter quarters, plaintiff's employees were protecting the barges and towboats and were making alterations and repairs on some of them.

23. No representative of defendant ordered plaintiff to take the barges and towboats out of winter quarters. While the towboats and barges were still in winter quarters, the Secretary of War on March 3, 1923, transmitted to Colonel Ashburn, the Chief of the Inland and Coastwise Waterways Service, a letter addressed to plaintiff, with written instructions for the delivery of the letter to plaintiff, the body of which letter is as follows:

> Pursuant to the right reserved in paragraph eight of the contract dated May 28, 1919, and the supplement thereto dated May 26, 1921, between you and the United States, for the operation as a common carrier of a fleet of four towboats and nineteen barges, and the erection of unloading facilities, you are hereby notified that in my judgment you have not complied with the terms and conditions of said contract in that you have failed to operate the said towboats and barges as a common carrier and in other particulars.
>
> I, therefore, declare the said contract and the supplement thereto terminated. You are hereby directed upon the receipt of this

> notice immediately to deliver possession of the said towboats and barges, and any unloading facilities erected pursuant to the supplemental contract and paid for by funds of the United States, to Colonel T. Q. Ashburn, Chief Inland and Coastwise Waterways Service, who will deliver this notice and who is instructed and authorized to receive and receipt for the property herein mentioned.

On the same day when the letter and instructions were transmitted to Ashburn, which was a Saturday, plaintiff was in Washington and Ashburn delivered the letter to plaintiff in Washington during the afternoon of Sunday, March 4, 1923.

24. Prior to the delivery to plaintiff of the letter of March 3, 1923, from the Secretary of War, plaintiff had no notice or knowledge of any intention on the part of the Secretary of War to attempt to terminate the original contract or the supplemental contract, and the Chief of Engineers had not been consulted by the Secretary of War about terminating the contracts and did not know of the action of the Secretary of War in sending the letter until some time after the delivery thereof.

25. On March 8, 1923, plaintiff sent a letter to the Secretary of War, the body of which is as follows:

> On Sunday, March 4, 1923, there was served upon me by Colonel T. Q. Ashburn, Chief, Inland and Coastwise Waterways Service, your letter of March 3, 1923, stat-

ing that in your judgment I had not complied with the terms and conditions of my contract with the Government dated May 28th, 1919, in that I had failed to operate the towboats and barges specified in said contract as a common carrier, and in other particulars; that therefore you declared said contract terminated and directed me to immediately deliver possession of said towboats and barges, and unloading facilities erected pursuant to a supplemental contract, to said Colonel T. Q. Ashburn.

This notice was served upon me while I was in Washington on other business, and without any previous intimation that any step of this kind was contemplated, and I was informed by Colonel Ashburn that I must give an answer to this notice by six o'clock today.

The abruptness of the action attempted to be taken, and the very brief opportunity allowed for any answer on my part, necessarily requires that my reply be brief.

Most respectfully, I decline to comply with your demand. To do so would deprive me, without any notice whatever, or opportunity to be heard, of rights and property lawfully acquired at a very large expenditure by me of time and money. I have in face of most unjust interference and restrictions fully complied with all the terms of my contract, and further, I have complied with every demand or requirement made of me by either you or the Chief of Engineers of the

United States, the lessor named in my contract.

The exercise of your judgment is, I am convinced, based upon inadequate and inaccurate information and has in fact no substantial basis on which to rest. This I believe will be fully demonstrated to you if I am granted a fair and impartial hearing to which as a citizen I am entitled, and which, in fairness and justice I now request.

Plaintiff never received any reply to this letter and was never granted the hearing requested in the letter.

26. Thereafter plaintiff caused the towboat *Illinois* to be prepared to resume operation and plaintiff caused it to have steam up and be ready to leave St. Louis for Caseyville, Kentucky, on Monday morning, March 26, 1923, in order to tow some of the barges from the latter point with a cargo of coal which had there been offered for transportation.

27. On March 22, 1923, the Acting Secretary of War transmitted a memorandum to Ashburn, Chief of the Inland and Coastwise Waterways Service as follows:

1. You are hereby designated as the representative of the United States for the purpose of taking possession of the towboats and barges leased by the United States to Edward E. Goltra under a contract dated May 28th, 1919.

2. You will proceed to St. Louis, Missouri, Fayville, Illinois, and, if necessary, to

Paducah, Kentucky, or elsewhere the said property may be found, and at once take possession of all of the said towboats and barges, or any number thereof that may be found.

3. In taking such possession you are directed not to employ or use any action that will occasion strife, bodily force, or endanger the public peace.

4. If physical resistance be offered to your taking such possession you are further directed to report that fact with all attending circumstances to me at once.

28. On Sunday, March 25, 1923, while plaintiff was in New York, Ashburn, and several men under his command, acting under orders of the Acting Secretary of War, went to the several places where seventeen of the barges and the four towboats lay moored in the possession of plaintiff's employees and took them from the possession of said employees without the consent of plaintiff or his employees for the use and benefit of the United States.

29. The Chief of Engineers did not know of the order of the Acting Secretary of War to Ashburn to seize the barges and towboats contained in the memorandum of March 22, 1923, or of the proposed seizure until after such seizure had occurred.

30. The District Engineer at St. Louis did not know of the order of the Acting Secretary of War to Ashburn to seize the barges and towboats contained in the memorandum of March 22, 1923, or of the proposed seizure until after such seizure had

occurred. On March 26, 1923, the District Engineer, learning about the seizure, pursued the seized vessels down the Mississippi River because he deemed himself officially responsible for the vessels, but upon being shown a letter from the Acting Secretary of War directing Ashburn to seize the barges and towboats he returned to St. Louis.

31. Prior to the seizure of the barges and towboats on March 25, 1923, the Chief of Engineers had not arrived at any judgment or conclusion or rendered any report to anyone to the effect that plaintiff had in any manner failed to perform any of his obligations under the contracts.

32. Commercial operation of barges and towboats of the same general type as plaintiff's in or out of St. Louis did not commence in the year 1923 prior to the seizure of the barges and towboats by Ashburn, and the Mississippi-Warrior Service did not operate any commercial tow in or out of St. Louis in the year 1923 prior to the seizure.

33. At the time of their seizure the barges and towboats were in good condition and repair and contained all of the alterations and repairs which plaintiff had placed thereon since delivery to him by defendant on July 15, 1922.

34. At all times from the delivery of the barges and towboats to plaintiff on July 15, 1922, until the seizure thereof on March 25, 1923, plaintiff, in connection with his operation and maintenance of the barges and towboats as a common carrier, maintained barge line docks with railroad connection

and unloading facilities in St. Louis, offices in St. Louis equipped with telephone service, signs indicating to the public the location of the docks and offices of the Goltra barge line, and stationery indicating the offices of the Goltra barge line, and maintained a staff of employees to perform all services in connection with the operation and maintenance of the barges and towboats.

Plaintiff also held himself out as a common carrier by means of the barges and towboats between points on the Mississippi River and its tributaries of all cargo suitable for transportation by means of barges and towboats, which might be offered to him by anyone and was ready, willing, and able to transport such cargo. During this time plaintiff solicited business and endeavored to get cargo for transportation, and it was well known in the Mississippi Valley that he had the barges and towboats and was seeking business therefor.

35. During the late summer and fall of 1922, and winter of 1922–23, the water in the Mississippi River and its tributaries was lower than it had ever been in recorded history. During that period the low water and peculiar channel conditions caused the grounding of many barges and towboats, including those operated by the Mississippi Warrior Service.

Barges and towboats could only be operated on the Mississippi River above St. Louis and below St. Louis to Cairo and on the Ohio River under great difficulties due to low water, which resulted in

groundings, delay, and damage even with light and unprofitable loads.

There was no possible cargo offered to plaintiff except that hauled by him and referred to in finding 17. From July 15, 1922, to March 25, 1923, plaintiff, as a common carrier, transported by means of the barges and towboats all the cargo offered that the barges were equipped to carry.

36. After Ashburn had seized the barges and towboats, a suit was commenced on plaintiff's behalf in the District Court of the United States for the Eastern District of Missouri against the Secretary of War, Ashburn, and the United States District Attorney at St. Louis, and a bill of complaint was filed therein. In the bill of complaint, plaintiff prayed, among other things, for temporary and permanent injunctive relief looking toward the restoration to him of the towboats and barges and the unloading facilities, and restraining defendants from interfering with plaintiff's possession thereof and an adjudication of plaintiff's rights under the original and supplemental contracts. On the same day, plaintiff was granted a temporary restraining order requiring defendants to restore to plaintiff possession of all of the towboats and barges which had been seized, and requiring defendants to show cause why temporary injunction should not issue.

37. The temporary restraining order and order to show cause, together with the bill of complaint, was served upon Ashburn as he was proceeding

south on the Mississippi River with the towboats and barges which he had seized. Ashburn made a motion to quash said service, which motion was denied and Ashburn was ordered to return the towboats and barges to the jurisdiction of the court at the Port of St. Louis, Missouri. Thereafter, the towboats and barges remained in the custody of defendant until September 1924.

38. On or about April 27, 1923, General Lansing H. Beach, Chief of Engineers, signed a letter which reads as follows:

> WAR DEPARTMENT,
> OFFICE OF THE CHIEF OF ENGINEERS,
> *Washington, April 27, 1923.*
>
> E. F. GOLTRA, ESQ.,
> *La Salle Building, St. Louis, Missouri.*
>
> SIR: Pursuant to the right reserved in paragraph eight of the contract dated May 28, 1919, and the supplement thereto dated May 26, 1921, between you and the United States, for the operation as a common carrier of a fleet of four towboats and nineteen barges, and the erection of unloading facilities, you are hereby notified that in my judgment you have not complied with the terms and conditions of said contract in that you have failed to operate the said towboats and barges as a common carrier.
>
> I, therefore, declare the said contract and the supplement thereto, terminated. You are hereby directed upon the receipt of this notice immediately to deliver possesssion to the United States of the said towboats and

barges, and any unloading facilities erected pursuant to the supplemental contract and paid for by funds of the United States.

Very truly yours,

(Signed) LANSING H. BEACH,
Lansing H. Beach,
Major General, Chief of Engineers.

This letter was signed by General Beach at the direction of the Secretary of War and did not represent the judgment of the Chief of Engineers.

39. On September 4, 1924, after a hearing, Honorable C. B. Faris, United States District Judge, made an order granting temporary injunction which required the defendant forthwith to restore to plaintiff at the Port of St. Louis all of the barges, towboats, and other facilities and appliances seized by defendants, subject to an accounting for damages resulting from the use and possession of the property since the seizure thereof and restraining those defendants from taking any of the property from plaintiff's possession until further order of the court.

40. The order granting the temporary injunction was reversed on appeal on July 23, 1925, by the United States Circuit Court of Appeals for the 8th Circuit in a decision reported in 7 F. (2d) 838, and on June 7, 1926, on writ of certiorari, the Supreme Court of the United States, in a decision reported in 271 U. S. 536, affirmed the decision of the Circuit Court of Appeals. Thereupon, between June 23, 1926, and August 1926, pursuant to and acting upon

the mandate of the Supreme Court, defendant resumed the possession of the towboats, barges, and unloading facilities which had been acquired by defendant on March 25, 1923, but had been interrupted by the temporary injunction of September 4, 1924. Defendant has retained possession of the boats and barges since August 1926, and has caused the same to be operated as a part of the Mississippi Warrior Service.

41. On November 7, 1927, the Judge of the District Court for the Eastern District of Missouri, finally disposed of plaintiff's litigation with the Secretary of War and Ashburn, by granting a motion to dismiss an amended and supplemental bill of complaint. On November 2, 1928, the determination of the District Court was affirmed by the United States Circuit Court of Appeals for the 8th Circuit in a decision reported in 29 F. (2d) 257, and on March 11, 1929, the Supreme Court of the United States, in a decision reported in 279 U. S. 843, denied a petition for writ of certiorari.

42. On or about December 6, 1924, plaintiff again undertook to exercise his option to purchase the fleet, and for that purpose appointed an appraiser, so notifying the Chief of Engineers and requesting him likewise to appoint an appraiser. The Chief of Engineers refused the request, assigning as his reason therefor the seizure of the towboats and barges and the then pending litigation.

43. For the purchase and installation of the oil-burning equipment upon the towboat *Illinois* re-

ferred to in finding 16, plaintiff spent the amount of $6,414.28, which was a reasonable expense therefor, and for which sum plaintiff has never been reimbursed.

44. For desirable or necessary repairs to and replacement of defective feed pumps on the towboat *Illinois,* plaintiff spent the amount of $1,027.23, and for other desirable or necessary additions, changes, and repairs on the towboat *Illinois,* plaintiff spent the amount of $732.11. These expenditures were reasonable and plaintiff has never been reimbursed therefor.

45. For installation of powdered coal-burning equipment on the towboat *Minnesota,* which installation was desirable, plaintiff spent the amount of $7,140.89, which was a reasonable expense therefor and for which sum plaintiff has never been reimbursed.

46. At the time of the seizure of the barges and towboats on March 25, 1923, there were on the towboat *Illinois,* fuel oil and other supplies belonging to plaintiff for which plaintiff had paid, and the reasonable value of which was $5,038.44. No part of the supplies was returned to plaintiff, and he has never been reimbursed therefor.

47. When the barges and towboats were returned to plaintiff in September 1924, under the order of the United States District Court, they were damaged and in need of many repairs other than ordinary current repairs, and many parts were missing from some of the towboats. None of these condi-

tions existed when the barges and towboats were seized. By reason of these conditions, plaintiff spent for repairs and replacements the amount of $79,474.52, which was a reasonable expense therefor and for which sum he has never been reimbursed.

48. For insurance which plaintiff was required by Section 2 (b) of the original contract to procure, he spent the amount of $21,017.73 for the period from July 15, 1922, to March 25, 1923, and the amount of $30,830.30 for the period from September 1924 to July 1926, which amounts were a reasonable expense for insurance and for which plaintiff has never been reimbursed.

49. During both periods that plaintiff was in possession of the towboats and barges he operated at a loss.

50. Pursuant to the supplemental contract, plaintiff provided, in the year 1921, at his own expense, the tract of land (hereinafter referred to as the land provided by plaintiff), and concrete runways located on part thereof, on which the unloading facilities referred to in the supplemental contract were to be erected and were to stand and operate; the remainder of the concrete runways was located on the land of the Mississippi Valley Iron Company by permission of that company procured by plaintiff, and with the consent of the District Engineer to such arrangement. The land provided by plaintiff was accreted and was located in the City of St. Louis and extended from the Mississippi River on the east to the right-of-way

of the St. Louis & Iron Mountain Railroad Company (Missouri Pacific), on the west, and was directly east of the 6500 South Broadway Block in the City of St. Louis. Plaintiff caused the runways to be built at his own expense according to plans submitted by plaintiff to and approved by the District Engineer. Defendant caused the unloading facilities referred to in the supplemental contract to be erected on the concrete runways. The unloading facilities consisted of a steel travelling crane which moved along the runways. The travelling crane was a substantial structure, of great height and length and was so equipped that the bucket of the crane, having a 10-ton capacity, could be lowered over the water into the holds of barges tied to the bank of the Mississippi River alongside said tract of land, and remove cargo from the barges and deposit the same in railroad cars or other means of transportation.

The construction of the concrete runways cost plaintiff the amount of $36,061.49, which was a reasonable cost therefor and for which plaintiff has never been reimbursed.

51. For the entire periods that plaintiff was in possession of the fleet the reasonable rental value of the land provided by him for runways and loading facilities was $6,000.00.

52. On February 13, 1930, plaintiff sent a letter to the Secretary of War as follows:

> In connection with my claim against the United States and/or the Inland Waterways

> Corporation, arising out of the occupation of real estate owned by me in South St. Louis, Missouri, by unloading facilities erected thereon by the United States Government under the provisions of the supplemental contract between the Chief of Engineers and myself, dated May 26, 1921, I beg to advise that if the United States and/or the Inland Waterways Corporation will immediately release and convey to me the said unloading apparatus and will immediately vacate and deliver to me possession of my property upon which said apparatus is located, I will release the Government from any and all claims accruing to me account of the aforesaid supplemental contract, save only my claims for use of my property, the expense of the caretakers (Watchmen), and accrued interest on these said claims, all up to the date of the aforesaid conveyance and notice of release to me of my property.

Defendant refused to take further action upon these claims in connection with the unloading facilities and the land provided by plaintiff because of the pendency of litigation between plaintiff and Inland Waterways Corporation involving the supplemental contract. On August 13, 1930, the Acting Secretary of War sent a letter to plaintiff, the body of which is as follows:

> Referring to the conversations and correspondence heretofore had relative to an unloading apparatus erected upon lands owned by you at St. Louis, Missouri, under

> the provisions of a supplemental contract dated May 26, 1921, and subsequently terminated, you are advised that the United States claims no right, title, or interest whatsoever in the said unloading apparatus, or in the real estate upon which it is situated, and waives whatever right, title, or interest it may be thought to have in the same.

On August 21, 1930, the plaintiff sent a letter to the Chief of Engineers, as follows:

> Herewith copy of a communication received by me from Acting Secretary of War F. H. Payne.
>
> Will you kindly advise me whether or not I am to understand that you, in your capacity as one of the parties to the supplemental contract referred to in Mr. Payne's herewith attached communication, concur in same and do now notify me you have no further use for my property and your leasing privilege under same is now by your free act positively terminated.

On August 28, 1930, the Chief of Engineers sent a letter to plaintiff, the body of which is as follows:

> 1. Reference is made to your letter of the 21st instant regarding the unloading apparatus erected on your property at St. Louis, Mo., pursuant to a certain supplemental contract dated May 26, 1921.
>
> 2. In reply you are advised that the Chief of Engineers concurs in the letter addressed to you under date of August 13, 1930, in which you were advised that the "United

States claims no right, title, or interest whatsoever in the said unloading apparatus, or in the real estate upon which it is situated, and waives whatever right, title, or interest it may be thought to have in the same."

53. At all times the salvage value of the concrete runways was less than the cost of removing them.

COUNTERCLAIMS

54. In September 1925, the defendant sold and delivered to the plaintiff 3,568.8 barrels of fuel oil, the reasonable value of which was $1.35 per barrel, or a total of $4,817.88, for which the plaintiff has not paid anything to the defendant. No demand for payment of this sum was made before the filing by the defendant of its first counterclaim in this cause.

55. On or about June 15, 1928, the plaintiff filed with the Collector of Internal Revenue at St. Louis, Missouri, his income-tax return for the year 1927, showing a net loss for the year and no tax due, whereas in fact the plaintiff had a net income for said year subject to income tax, amounting to $38,696.70, and the tax thereon amounted to the sum of $1,697.92, which the plaintiff failed to pay and for which he is indebted to the defendant with interest thereon. On or about December 7, 1931, plaintiff executed and filed with the Commissioner of Internal Revenue a consent that an assessment of income tax due from the plaintiff for the year 1927 might be made by said Commissioner on or before December 31, 1932, except that if a notice

of deficiency in tax was sent to the taxpayer on or before that date, the time for making assessments should be extended beyond that date by the number of days during which the Commissioner was prohibited from making an additional assessment, and for sixty days thereafter.

On or about December 29, 1932, a notice of deficiency for the year 1927 in the amount of $1,697.92 was mailed by the Commissioner of Internal Revenue to the plaintiff. On or about March 18, 1933, within the time extended by the said consent of December 7, 1931, the Commissioner of Internal Revenue assessed as the tax of the plaintiff for the year 1927 the sum of $1,697.92, together with interest thereon in amount of $510.21, aggregating the sum of $2,208.13. Notice of the assessment was given to the plaintiff, and demand for payment was made by the Collector of Internal Revenue on or about March 22, 1933; and on April 11, 1933, the Collector granted an extension of time for the payment of this amount to March 1, 1934. Said amount has not been paid by the plaintiff.

On March 14, 1930, plaintiff filed with the Collector of Internal Revenue of St. Louis, Missouri, a tentative income-tax return for the year 1929, disclosing no net income and no tax due, whereas, in fact, for the year 1929 the plaintiff had a net income subject to income tax in the sum of $22,954.25, and the tax thereon amounted to the sum of $377.26. The time for filing the return for the year 1929 was extended by the Collector to

April 15, 1930, but plaintiff has filed no further return for that year.

On or about February 7, 1932, the Commissioner of Internal Revenue mailed to plaintiff a notice of the tax determination for the year 1929. On or about April 27, 1934, the Commissioner of Internal Revenue assessed the tax against plaintiff for the year 1929 in the amount of $377.26, together with a penalty of $94.32 for failure to file a return as required by law. and interest on said tax of $93.17. Notice of said assessment was given and demand for payment was made by the Collector of Internal Revenue on April 30, 1934, but said amount has not been paid by the plaintiff.

For the year 1930 plaintiff filed no income-tax return, whereas, in fact, he had a net income subject to income surtax in the sum of $11,631.49, and the tax thereon amounted to the sum of $16.31, of which the sum of $8.00 had been paid at the source, leaving a balance of $8.31 due and owing. On February 7, 1934, the Commissioner of Internal Revenue mailed to the plaintiff a notice of the tax determination for the year 1930. On or about April 27, 1934, the Commissioner of Internal Revenue assessed a tax for the year 1930 in amount of $8.31, together with a penalty of $2.08 for failing to file a return and interest on the tax of $1.55. Notice of assessment was given and demand for payment thereof was made by the Collector of Internal Revenue on or about April 30, 1934, but said amount has not been paid by the plaintiff.

The total of the above taxes with interest and penalties is $2,784.82.

56. The counterclaims being valid are allowable.

Taking the amount of the counterclaims and all the relevant facts and circumstances, including the expenses of plaintiff, into consideration, the value for the lease, option to purchase, and all legal and equitable claims as of March 25, 1923, is $350,000.

CONCLUSION OF LAW

Upon the foregoing special findings of fact, which are made a part of the judgment herein, the court decides, as a conclusion of law, that the defendant is entitled to recover on the counterclaims and the plaintiffs are entitled to recover, after deduction of the counterclaims, the sum of $350,000.00, with interest at six percent per annum from March 25, 1923, to the date of payment, not as interest but as a part of just compensation.

It is therefore ordered and adjudged that plaintiffs recover of and from the United States the sum of three hundred fifty thousand dollars ($350,000) with interest at six percent per annum, from March 25, 1923, to the date of payment.

OPINION

WHALEY, Chief Justice, delivered the opinion of the court:

Before this suit was argued and submitted to the court, Edward F. Goltra departed this life on April 2, 1939, and his qualified executors were sub-

stituted as plaintiffs. Wherever the word "plaintiff" is used in this opinion, reference is made to Edward F. Goltra and not to the substituted plaintiffs.

This case was brought to the court under a special jurisdictional act, 48 Stat. 1322, which reads as follows:

> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That jurisdiction is hereby conferred upon the Court of Claims of the United States, whose duty it shall be, notwithstanding the lapse of time or the bar of any statute of limitations or previous court decisions, to hear, consider, and render judgment on the claims of Edward F. Goltra against the United States for just compensation to him for certain vessels and unloading apparatus taken, whether tortiously or not, on March 25, 1923, by the United States under orders of the Acting Secretary of War, for the use and benefit of the United States; and any other legal or equitable claims arising out of the transactions in connection therewith: * * *

It will be seen that this act not only waives the statute of limitations but orders the court to hear, consider, and render judgment notwithstanding any previous court decisions and to give just compensation for the claims of plaintiff for the taking of certain vessels and unloading apparatus under orders of the Acting Secretary of War, whether

the taking was tortious or not, and for any other legal or equitable claims arising out of the transactions.

When this bill was before the Committees of Congress, the Committees gave full consideration to the decision of the Supreme Court in the case of *Goltra* v. *Weeks,* 271 U. S. 536. This case involved an injunction and the Committees were aware that the merits of the case had never been considered by the court. The Committees also had before them a letter from the Attorney General urging the passage of the bill so that the plaintiff could have his day in court on the merits of the case. The real question involved was whether the cancellation of plaintiff's two contracts by the Secretary of War on March 3, 1923, followed by the seizure of the fleet on March 25, 1923, under orders of the Acting Secretary of War, was within the terms of the contracts between the plaintiff and the defendant. The Court held that the "lessor" mentioned in the contract meant the Chief of Engineers and not the Secretary of War.

On May 28, 1919, plaintiff entered into a contract with William M. Black, Major General, Chief of Engineers, U. S. Army, whereby the barges and towboats still under construction were leased to the plaintiff for a term of five years after delivery of the first unit, with an option to plaintiff to purchase the fleet and pay therefor in instalments over a period of fifteen years from the exercise of the option; the rental consisted of all net earnings

made by the fleet and was to be credited on account of the purchase price of the fleet. As part of the transaction plaintiff released the United States from all claims which he had against them as a result of certain engagements made for World War purposes.

On May 26, 1921, a supplemental agreement was entered into between the parties by which the plaintiff agreed to furnish, subject to the defendant's approval, a certain tract of land and runway on which unloading facilities furnished by the lessor were to be erected. The unloading facilities were furnished by the lessor and erected on the land after the runways had been provided by the plaintiff.

On July 15, 1922, the defendant delivered the 19 barges and 4 towboats.

From the time of the delivery of the barges and towboats to the plaintiff, they were operated by the plaintiff as a common carrier until December 1, 1922, when they were placed in winter quarters with the approval and consent of the District Engineer, acting for and as the representative of the Chief of Engineers. It was understood that the fleet was to remain in winter quarters until navigation could be safely resumed in the spring of 1923. During the time that plaintiff had possession of the fleet it was operated to the best advantage by him and plaintiff, as a common carrier, transported all the cargo offered that the barges were equipped to carry. There was no complaint or protest by the

lessor of the operation of the fleet or the failure to accept cargo by the defendant.

On March 3, 1923, the Secretary of War transmitted to Colonel Ashburn, who was one of the officials of the Mississippi Warrior Service, which was a fleet of barges and towboats owned by the Government and operated on the Mississippi River, a letter addressed to plaintiff in which the Secretary of War stated that, pursuant to the right under paragraph eight of the original contract and the supplemental contract, in his judgment, the plaintiff had not operated the barges and towboats under the terms and conditions of the contract and had failed to operate them as a common carrier and declared the contract and the supplemental contract to be terminated. He requested the plaintiff to deliver the fleet and the unloading facilities to Colonel Ashburn. This letter was delivered by Colonel Ashburn to the plaintiff in Washington, D. C., during the afternoon of Sunday, March 4, 1923.

On March 8, 1923, plaintiff declined to comply with the demands of the Secretary of War complaining of the unjust interferences and restrictions which had been interposed and asserted that he had complied with every demand and requirement of the Chief of Engineers who was the lessor named in the contract.

On March 22, 1923, the Acting Secretary of War authorized Colonel Ashburn, as a representative of the United States, to take possession at once of

all of the barges and towboats or any number that could be found. Colonel Ashburn, acting upon the above order went to St. Louis on March 25, 1923, and while plaintiff was absent took the fleet from the possession of the fleet's employees without their consent for the use and benefit of the United States. The nature of the seizure is best described by the United States District Engineer who wired the Chief of Engineers as follows:

> Col. Ashburn with the Federal Barge Line towboat *Vicksburg* and about forty men arrived at Goltra fleet yesterday Sunday morning about eleven overawed Goltra's men and towed four boats and one barge down river about six miles Stop Vicksburg left them on Illinois side, came back to St. Louis, placed four Goltra barges at Barge Line Terminal and went down river with all other Goltra barges wintered at this city * * *.

After the seizure a suit was commenced in plaintiff's behalf in the District Court of the United States against the Secretary of War, Colonel Ashburn, and the United States District Attorney. A temporary order was obtained and the barges were returned to the jurisdiction of the court and brought to St. Louis but they remained in the custody of the defendant until September 4, 1924.

After the hearing on the application for the injunction, the District Judge granted plaintiff's request and ordered the barges returned to him. At this trial a letter from the Chief of Engineers cancelling the contract was presented for the consid-

eration of the court on behalf of the defendant. This letter is dated April 27, 1923, several months after the cancellation of the contract by the Secretary of War and more than a month after the seizure of the fleet by the acting Secretary of War.

The case was appealed to the Circuit Court which reversed the District Judge and the case was then taken to the Supreme Court of the United States.

On June 7, 1926, the Supreme Court affirmed the decision of the Circuit Court and the fleet was delivered to the defendant during June and September of that year. In its decision the Supreme Court held (271 U. S. 536, 548, 550):

> Nor does the circumstance that, as in this case, the lessor whose judgment is to prevail is a party to the contract alter the legal result. Of course the Chief Engineer is not the real party in interest. He is a professional expert, as such was designated as lessor, and is really acting only as an agent for the Government. * * *
>
> * * * The right of the lessor to take over the fleet under § 8 of the contract, unless there was fraud in the judgment of termination by the Chief of Engineers, the lessor, of which we have found no evidence, is clear. We think, therefore, the injunction should be dissolved and the fleet restored to the lessor.

It will be seen that the decision of the Supreme Court was based on the assumption that the Chief of Engineers had exercised his judgment in a fair

and impartial way and terminated the contract.

In the trial of the instant case it is shown that the Chief of Engineers did not exercise his own judgment but was coerced, after the Acting Secretary of War had seized the fleet, in signing the order cancelling the contract.

The evidence is clear and convincing that the Chief of Engineers believed the plaintiff had performed his part of the contract and that there was no cause or reason which would justify him in cancelling the contract. He testified that he did not exercise his own judgment but that, when the letter was presented to him for his signature, he was forced to sign.

It is apparent from the record that the Chief of Engineers did not exercise his judgment in cancelling the lease before the cancellation of the contract by the Secretary of War and the subsequent seizure of the fleet by the Acting Secretary of War.

The cases are too numerous for citation that the plaintiff was entitled to an uninfluenced decision by the Chief of Engineers and that he alone could act.

The Secretary of War had no authority under the contract to exercise the right conferred upon the Chief of Engineers and, until the Chief of Engineers had cancelled the contract, the action of the Secretary of War, in cancelling the contract, was *ultra vires,* and the action of the Acting Secretary of War in ordering the seizure of the fleet by Colonel Ashburn was a tortious act. *Burton*

Coal Co. v. *United States,* 60 C. Cls. 294, affirmed 273 U. S. 337; *Williams Eng. & Cont. Co.* v. *United States,* 55 C. Cls. 349; *Michael H. King* v. *United States,* 37 C. Cls. 428; *Sun Shipbuilding Co.* v. *United States,* 76 C. Cls. 154; *Helvetia Milk Condensing Co.* v. *United States,* 74 C. Cls. 142 and *Lutz Co.* v. *United States,* 76 C. Cls. 405.

The plaintiff having been deprived of his lease and option to purchase, illegally and wrongfully, the question arises as to what compensation he shall receive.

Plaintiff only had a contract for a lease of the fleet for five years with an option to purchase. He attempted to exercise the option to purchase but the defendant refused to comply with the provision of the contract with reference to the appointment of arbitrators to fix the value which should be paid.

During the operation of the fleet from July 1922, to December 1, 1922, the plaintiff sustained a loss. This was a new service and large expenditures had to be made for prospective business, for providing land and runways, for costs incurred for advertising the service, insurance, and for repairs and changes in the towboats. Plaintiff was prohibited from charging less than the rail rate. The loss can be well understood.

It is contended by the plaintiff that, in arriving at just compensation, an offer to rent the fleet made years after the fleet had been seized and the rental value of similar vessels on the Mississippi River

should be taken into consideration. These contentions cannot be sustained. *Sharp* v. *United States*, 191 U. S. 341, 348, 349; *Clarke* v. *Hot Springs Electric Light & Power Co.*, 55 Fed. (2d) 612; and *Sommers* v. *Commissioner of Internal Revenue*, 63 Fed. (2d) 551.

There were no other towboats and barges on the Mississippi River at that time which could have been rented. There was no market value for the lease and option to purchase. Reproduction less depreciation or cost less depreciation are not fair bases on which to place valuation. Plaintiff is entitled to have taken into consideration what he spent in inaugurating the service and the cost of repairs and changes made to the towboats and the supplies furnished by him. Prospective profits cannot be considered. No profits were made by the plaintiff during the time he had possession of the fleet from September 1924 to July 1926. This was primarily due to the fact that all shippers on the Mississippi River realized that the fleet was tied up in litigation and possession was being sought through the courts by the defendant.

As was said by Justice Butler in *Standard Oil Co.* v. *So. Pacific Co.*, 268 U. S. 146, 156:

> It is to be borne in mind that value is the thing to be found and that neither cost of reproduction new, nor that less depreciation, is the measure or sole guide. The ascertainment of value is not controlled by artificial rules. It is not a matter of formulas, but

> there must be a reasonable judgment having its basis in a proper consideration of all relevant facts.

As the plaintiff only possessed a lease with an option to purchase and there being no market value, it is necessary for the Court, in arriving at an amount sufficient to compensate him for injuries sustained, to take into consideration all outlays made by him including the rental value of his land, and make reasonable deduction for the less time engaged and for release from care, trouble, risk, and responsibility attending a full execution of the contract. *United States* v. *Speed,* 75 U. S. 77.

In *Hetzel* v. *Baltimore & Ohio Railroad Co.,* 169 U. S. 26, 37, 38, 39, the court said:

> * * * in such inquiries, absolute certainty as to the damages sustained is in many cases impossible. All that the law requires is that such damages be allowed as, in the judgment of fair men, directly and naturally resulted from the injury for which suit is brought. This is the rule which obtains in civil actions for damages. They have their foundation in the idea of just compensation for wrongs done.

The court quoted with approval from *Baker* v. *Drake,* 53 N. Y. 211, 220, as follows:

> The proof may sometimes be rather difficult upon the question whether the damage was the just or proximate result of the breach of the covenant. In such case it does

> not come with very good grace from the defendant to insist upon the most specific and certain proof as to the cause and the amount of the damage when he has himself been guilty of a most inexcusable violation of the covenants which were inserted for the very purpose of preventing the result which has come about.

In *Hoffer Oil Corporation* v. *Carpenter*, 34 Fed. (2d) 589, 592, the court said:

> A person who has violated his contract will not be permitted to reap advantage from his own wrong by insisting upon proof which, by reason of his breach, cannot be furnished. * * *
>
> A party, who has broken his contract, will not be permitted to escape liability because of the lack of a perfect measure of the damages caused by his breach. * * *
>
> A reasonable basis for computation, and the best evidence which is obtainable under the circumstances of the case and which will enable the jury to arrive at an approximate estimate of the loss, is sufficient.

See *Eastman Kodak Co. of New York* v. *Southern Photo Materials Company*, 273 U. S. 359.

Taking all the relevant facts into consideration and after allowing the counterclaims, in making a jury award, the Court concludes that the sum of $350,000.00 is just compensation for the vessels and unloading apparatus and all other claims, legal or equitable, arising out of the transactions.

Judgment is entered for the plaintiffs in the sum of $350,000.00, with interest at six percent per annum, not as interest but as a part of just compensation, from March 25, 1923, to the date of payment. *Virginia Engineering Company* v. *United States*, 89 C. Cls. 457.

It is so ordered.

[illegible]ETON, *Judge;* and GREEN, *Judge;* concur.

WHITAKER, *Judge;* and WILLIAMS, *Judge,* took no part in the decision of this case.

A true copy.

Test:

Chief Clerk, Court of Claims
of the United States.

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No. 191

In the Supreme Court of the United States

OCTOBER TERM, 1940

UNITED STATES OF AMERICA, PETITIONER,

vs.

KATE B. GOULD AND E. PAUL GOULD, JR., EXECUTORS OF THE ESTATE OF EDWARD F. GOULD, DECEASED.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

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INDEX

	Page
Opinion below	1
Jurisdiction	1
Question involved	2
Statutes involved	2
Statement	2
Specification of errors to be urged	5
Reasons for granting the writ	6
Conclusion	8
Appendix	9

CITATIONS

Cases:	
Boston Sand Co. v. *United States*, 278 U. S. 41	6
Cherokee Nation v. *United States*, 270 U. S. 476	6
District of Columbia v. *Johnson*, 165 U. S. 330	6
Goltra v. *Davis*, 29 F. (2d) 257, certiorari denied, 279 U. S. 843	4
Goltra v. *Weeks*, 271 U. S. 536	4
Higo v. *United States*, 194 U. S. 315	7
Hooe v. *United States*, 218 U. S. 322	7
Jacobs v. *United States*, 290 U. S. 13	6, 7
Seaboard Air Line Ry. v. *United States*, 261 U. S. 299	6
Squaw Island Freight Terminal Co. v. *United States*, 89 C. Cls. 269	7, 8
Tilson v. *United States*, 100 U. S. 43	6
United States v. *Buffalo Pitts Co.*, 234 U. S. 228	7
United States v. *North Carolina*, 136 U. S. 211	6
United States v. *Verdier*, 164 U. S. 213	6
Virginia-Eng. Co., Inc. v. *United States*, 89 C. Cls. 457	8
Yearsley v. *Ross Construction Co.*, 309 U. S. 18	7
Statutes:	
Section 177, Judicial Code as amended (28 U. S. C. Sec. 284)	10
Private Law No. 69, April 18, 1934, 73d Cong., 2d Sess. (c. 150, 48 Stat. 1322)	4, 9
Miscellaneous:	
House Report 1426, 72d Cong., 1st Sess	7
House Report 828, 73d Cong., 2d Sess	7
Senate Report 362, 73d Cong., 2d Sess	7

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In the Supreme Court of the United States

OCTOBER TERM, 1940

No. ——

UNITED STATES OF AMERICA, PETITIONER

v.

KATE B. GOLTRA AND E. FIELD GOLTRA, JR., EXECUTORS OF THE ESTATE OF EDWARD F. GOLTRA, DECEASED

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

The Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgment of the Court of Claims in the above case. It is believed that the special jurisdictional Act, *infra*, p. 9, confers the right of appeal and an appeal has accordingly been taken. This petition is filed out of an abundance of caution.

OPINION BELOW

The opinion of the Court of Claims is not yet officially reported.

JURISDICTION

The judgment of the Court of Claims was entered April 1, 1940. The jurisdiction of this Court is

invoked under Section 3 (b) of the Act of February 13, 1925, as amended.

QUESTION INVOLVED

The Secretary of War seized vessels leased to the respondent; the court below found the seizure tortious and unauthorized. The question is whether interest can be allowed against the United States under a special statute conferring jurisdiction on the Court of Claims to "render judgment on the claims * * * for just compensation".

STATUTES INVOLVED

The applicable portions of the statutes involved are set forth in the Appendix, *infra*, pp. 9–10.

STATEMENT

On May 28, 1919, a contract was entered into between the petitioner, represented by the Chief of Engineers, United States Army, and respondent,[1] providing for the lease to respondent, with an option to purchase, of certain barges and towboats which petitioner was constructing for use as carriers on the Mississippi River and its tributaries.[2]

[1] Upon the death of Edward F. Goltra on April 2, 1939, his executors, Kate B. Goltra and E. Field Goltra, Jr., were substituted as parties plaintiff (Fdg. 1). Respondent, when used herein, refers to Edward F. Goltra.

[2] A supplemental contract between the same parties providing for certain unloading facilities was entered into and made a part of the original contract on May 26, 1921 (Fdg. 6).

(Fdg. 6). Section 8 of the contract provided that the Chief of Engineers, as lessor, could terminate the contract at any time that in his judgment the respondent was guilty of a breach of the contract. After various negotiations concerning the rates to be charged by respondent (Fdgs. 8–14), nineteen barges and four towboats were delivered to respondent on July 15, 1922 (Fdg. 15). These vessels, owing to mechanical difficulties and low water, were operated by respondent on a very limited scale (Fdgs. 16, 17, 35).

About December 1, 1922, respondent, with the consent of the District Engineer, and in accordance with local custom, placed the barges and towboats in winter quarters at St. Louis, Missouri (Fdg. 18). During this lay-up period the respondent was informed that various commercial organizations interested in transportation on the Mississippi River had complained to the Secretary of War of the inactivity of this fleet, and was notified by the Secretary that a failure to operate at maximum capacity would be regarded as a violation of the contract (Fdg. 20). Subsequently, while the boats were still tied up, the Secretary of War, on March 3, 1923, notified respondent that because he had failed to comply with the terms of the contract, the contract was terminated (Fig. 23). Respondent, on being informed of the Secretary's action, refused to comply with his request to deliver the boats to the designated official (Fdg. 25). On March 25, 1923, pursuant to orders of the Acting

Secretary of War (Fdg. 29), the boats were seized from respondent and possession taken by the United States (Fdg. 28). On April 27, 1923, respondent was notified by the Chief of Engineers that in his judgment respondent had failed to comply with the terms of the contract and therefore he was terminating the contract; the letter was signed at the direction of the Secretary of War and did not represent the judgment of the Chief of Engineers (Fdg. 38).

Respondent brought suit against the Secretary of War, seeking to enjoin him from seizing the vessels. The suit was concluded by a judgment of this Court adverse to respondent (Fdg. 40),[3] based on the Ground that the Chief of Engineers, as lessor, representing the United States, had exercised his judgment, without fraud, in terminating the contract. *Goltra* v. *Weeks,* 271 U. S. 536.

This action was instituted in the Court of Claims on July 20, 1934, pursuant to Private Act No. 69, 73d Cong., 2d Session, *infra,* p. 9, conferring jurisdiction upon that court to hear, determine, and enter judgment upon the "claims of Edward F. Goltra against the United States for just compensation" for the taking of the vessels and unloading apparatus, whether taken "tortiously or not," without regard to the statute of limitations, or to any previous court decisions.

---

[3] An amended complaint instituted by respondent was dismissed. *Goltra* v. *Davis,* 29 F. (2d) 257 (C. C. A. 8th), certiorari denied, 279 U. S. 843 (Fdg. 41).

The court below found that the Chief of Engineers had not exercised his own judgment in cancelling the contract, but had been coerced into cancelling the contract subsequent to the actual seizure of the vessels. It accordingly held that the contract had not been terminated in accordance with its provisions, and that the seizure of the vessels was tortious. The court allowed $350,000.00 as just compensation for the vessels, unloading apparatus, and all other claims. To this amount, however, it added interest at six percent per annum "not as interest but as a part of just compensation, from March 25, 1923, to the date of payment."

SPECIFICATION OF ERRORS TO BE URGED

The Court of Claims erred:

1. In holding that the Act of April 18, 1934, conferring jurisdiction upon it to entertain, hear, and render judgment on the claims of Goltra against the United States for just compensation for certain property taken, authorized it to award interest from the date of the alleged taking.

2. In holding that the use of the words "just compensation" in the Act called for the assessment of the same measure of damage as would apply to a taking of property by eminent domain.

3. In holding that the Act, in the absence of specific language expressly directing it so to do, authorized it to award interest.

4. In failing to hold that Section 177 of the Judicial Code precluded it from allowing interest on any claim against the United States prior to the time of the rendition of judgment.

5. In including in its judgment interest on the claim.

REASONS FOR GRANTING THE WRIT

1. The decision of the Court of Claims disregards settled principles. Section 177 of the Judicial Code prohibits the allowance of interest until the date of judgment unless the claim is founded on a contract expressly stipulating for the payment of interest. This Court has consistently held, under this section, that no interest may be recovered in a suit against the United States unless specifically authorized by Act of Congress or by contract. *Boston Sand Co.* v. *United States,* 278 U. S. 41; *Cherokee Nation* v. *United States,* 270 U. S. 476, 487; *District of Columbia* v. *Johnson,* 165 U. S. 330, 338; *United States* v. *Verdier,* 164 U. S. 213, 219; *United States* v. *North Carolina,* 136 U. S. 211; *Tilson* v. *United States,* 100 U. S. 43, 46.

Where property is taken by eminent domain, it is true that the just compensation required by the Fifth Amendment includes interest. *Jacobs* v. *United States,* 290 U. S. 13, 16, 17; *Seaboard Air Line Ry.* v. *United States,* 261 U. S. 299, 306. But the Fifth Amendment creates no obligation on the part of the Government where, as in this case, the taking is found to be the tortious and unauthorized

act of its officer. *Hooe* v. *United States,* 218 U. S. 322, 335, 336; *Jacobs* v. *United States,* 290 U. S. 13, 18; *Hijo* v. *United States,* 194 U. S. 315, 323; *cf. United States* v. *Buffalo Pitts Co.,* 234 U. S. 228, 233–235; *Yearsley* v. *Ross Construction Co.,* 309 U. S. 18, 20–22.

The words "just compensation" used in the jurisdictional Act would seem to be merely descriptive of "claims of Edward F. Goltra against the United States" and certainly are not words of art importing an obligation to pay interest when used as a measure of recovery for breach of contract or tort.[4]

2. The question presented is one of importance and should be decided by this Court in view of the uncertainty and confusion in the decisions of the Court of Claims. Within the past year the court below has on three occasions considered whether the use of the term "just compensation" in a special jurisdictional Act authorized the recovery of interest where the claims are founded on breach of contract or tort. Its decisions are in irreconcilable conflict. In *Squaw Island Freight Terminal Co.* v. *United States,* 89 C. Cls. 269, the Court of Claims held that a statute conferring jurisdiction to pass

[4] There is nothing in the legislative history of the Act here under consideration which indicates that it was the intent of Congress to confer authority upon the court below to award interest. The judiciary committees of both Houses concluded that the merits of Goltra's claims had never been passed upon, and stated that the sole purpose of the Act was to give him his "day in court." House Report 828, 73d Cong., 2d Sess.; Senate Report 362, 73d Cong., 2d Sess.; House Report 1426, 72d Cong., 1st Sess.

upon "the claim of [plaintiff] for just compensation" for loss of property caused by the negligence of Government officers did not authorize the allowance of interest, upon the ground (p. 278) that "There was no taking of plaintiff's property by the defendant for a public use within the meaning of the Fifth Amendment." In *Virginia Engineering Co., Inc.* v. *United States*, 89 C. Cls. 457, however, a statute authorizing the Court of Claims to determine the plaintiff's claim "and to award just compensation" for extra costs incurred at the request of a Government officer in the performance of a contract was held to require the allowance of interest. The court recognized that the plaintiff would only be entitled to the actual loss sustained in the absence of a special statutory provision but concluded (pp. 471–472) that the term "just compensation" had acquired a definite meaning entitling the claimant to the recovery of interest. And the Court of Claims now holds that statutory language identical with that employed in the *Squaw Island* case authorizes the allowance of interest from the date of the tortious seizure.

CONCLUSION

For the reasons above set forth, it is respectfully submitted that, if the appeal filed by the United States in this case should be dismissed, this petition for a writ of certiorari should be granted.

FRANCIS BIDDLE,
Solicitor General.

JUNE 1940.

APPENDIX

Private Law No. 69, of April 18, 1934, 73d Congress, 2d Sess. (48 Stat. 1322):

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That jurisdiction is hereby conferred upon the Court of Claims of the United States, whose duty it shall be, notwithstanding the lapse of time or the bar of any statute of limitations or previous court decisions, to hear, consider, and render judgment on the claims of Edward F. Goltra against the United States for just compensation to him for certain vessels and unloading apparatus taken, whether tortiously or not, on March 25, 1923, by the United States under orders of the Acting Secretary of War, for the use and benefit of the United States; and any other legal or equitable claims arising out of the transactions in connection therewith: *Provided,* That separate suits may be brought with respect to the vessels and the unloading apparatus, but no suit shall be brought after the expiration of one year from the effective date of this Act: *Provided further,* That either party may appeal as of right to the Supreme Court of the United States from any judgment in said case at any time within ninety days after the rendition thereof, and any judgment rendered in favor of the claimant shall be paid in the same manner as other judgments of said Court of Claims are paid.

Section 177, Judicial Code, as amended (28 U. S. C. Sec. 284):

(a) No interest shall be allowed in any claim up to the time of rendition of judgment by the Court of Claims, unless upon a contract expressly stipulating for the payment of interest, except as provided in subsection (b). [Subsection (b) relates to tax cases exclusively.]

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Nos. 191-192

In the Supreme Court of the United States

OCTOBER TERM, 1940

THE UNITED STATES, APPELLANT

v.

KATE B. GOLDEN AND E. FIELD GOLDEN, JR., EXECUTORS OF THE ESTATE OF EDWARD F. GOLDEN, DECEASED

KATE B. GOLDEN AND E. FIELD GOLDEN, JR., EXECUTORS OF THE ESTATE OF EDWARD F. GOLDEN, DECEASED, APPELLANTS

v.

THE UNITED STATES

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INDEX

	Page
Opinion below	1
Jurisdiction	2
Questions involved	2
Statutes involved	3
Statement	3
Specification of errors to be urged	10
Summary of argument	11
Argument:	
I. The Court of Claims erred in awarding interest from the date of the seizure of the vessels	25
A. The plaintiff is not entitled to just compensation under the Fifth Amendment	27
B. The jurisdictional Act does not provide for an award of interest against the United States	45
II. The Court of Claims gave due consideration to all relevant facts and evidence in rendering its award	54
A. The court was warranted in refusing to give effect to plaintiff's evidence as to the rental value of the fleet	58
1. The plaintiff's evidence of rental value was not pertinent in connection with the breach of the agreement to lease	59
2. There was no occasion to consider rental value in connection with the breach of the option to buy	63
3. The court properly refused to consider the offer of the Standard Oil Company to rent the vessels	70
B. Plaintiff is not entitled to additional recovery on account of the four percent interest rate in the option provision	72
C. The items of damage claimed by plaintiff for breach of the supplemental contract were not properly allowable	77
1. The court below was not required to consider the rental value of the unloading apparatus	78
2. The plaintiff's claim for the expense of maintaining watchmen for the unloading apparatus is specious	80
D. The award of the Court of Claims was more than adequate	80

Page

Conclusion 81
Appendix 83–84

CITATIONS

Cases:

Altrinchain Union v. *Cheshire Lines Committee*, L. R. 15 Q. B. D. 597 49
Andrus v. *United States*, 59 C. Cls. 851 ..... 28, 29
Angarica v. *Bayard*, 127 U. S. 251 25
Bliss, E. W., Co. v. *Buffalo Tin Can Co.*, 131 Fed. 51 69
Bohemian-American W. G. Ass'n v. *Northern Bank*, 120 N. Y. S. 134 ..... 76, 77
Boston Chamber of Commerce v. *Boston*, 217 U. S. 189 61
Boston Sand Co. v. *United States*, 278 U. S. 41 ..... 25, 50
Bothwell v. *United States*, 254 U. S. 231 68
Boyle v. *Reeder*, 23 N. C. 607 69
Brooks-Scanlon Corp. v. *United States*, 265 U. S. 106 26
Cadwalader v. *United States*, 59 C. Cls. 535 ..... 28, 29, 30
Camden Iron Works v. *United States*, 47 C. Cls. 124 72
Castelo v. *United States*, 51 C. Cls. 221 28
Cherokee Nation v. *United States*, 270 U. S. 476 25
Chesapeake & Ohio Ry. v. *Kelly*, 241 U. S. 485 ..... 23, 74
Clarke v. *Hot Springs Electric Light and Power Co.*, 55 F. (2d) 612 71
Conqueror, The, 166 U. S. 110 59
Coosaw Mining Co. v. *South Carolina*, 144 U. S. 550 49
Cramer v. *Grand Rapids Show Case Co.*, 223 N. Y. 63, 119 N. E. 227 69
Crosby v. *Dorward*, 248 Ill. 471, 94 N. E. 78 72
Crozier v. *Krupp*, 224 U. S. 290 ..... 39, 52
De Laval Co. v. *United States*, 284 U. S. 61 64
De Ford v. *Maryland Steel Co.*, 113 Fed. 72 69
Des Moines Wet Wash Laundry v. *City of Des Moines*, 197 Iowa 1082, 198 N. W. 486 60
Dubuque & Pacific R. R. Co. v. *Litchfield*, 23 How. 66 49
Filor v. *United States*, 9 Wall. 45 40
Gas Co. v. *Glass Co.*, 56 Kan. 614, 44 Pac. 621 69
Gibbons v. *United States*, 8 Wall. 269 ..... 15, 27, 41
Goltra v. *Davis*, 29 F. (2d) 257, certiorari denied, 279 U. S. 843 ..... 6, 44
Goltra v. *Weeks*, 271 U. S. 536 ..... 6, 8, 44, 61, 70, 80
Gooden v. *Moses*, 99 Ala. 230, 13 So. 765 76
Griffin v. *Colver*, 16 N. Y. 489 69
Harten v. *Loffler*, 212 U. S. 397 63
Hetzel v. *Baltimore & Ohio Railroad Co.*, 169 U. S. 26 48
Hijo v. *United States*, 194 U. S. 315 ..... 28, 40
Hill v. *United States*, 149 U. S. 593 ..... 28, 30, 31
Hooe v. *United States*, 218 U. S. 322 ..... 15, 27, 40
Howard v. *Stillwell & Bierce Mfg. Co.*, 139 U. S. 199 68
Howey v. *New England Nav. Co.*, 83 Conn. 278, 76 Atl. 469 48

Cases—Continued. Page

Hughes v. *United States*, 230 U. S. 24 ..... 11, 27
Hurley v. *Kincaid*, 285 U. S. 95 ..... 32, 33
Jackson v. *United States*, 27 C. Cls. 74 ..... 28, 30
Jacobs v. *United States*, 290 U. S. 13 ..... 11, 19, 26, 52, 53
Joslin Co. v. *Providence*, 262 U. S. 668 68
Juragua Iron Co. v. *United States*, 212 U. S. 297 28
Kinkead v. *United States*, 18 C. Cls. 504 ..... 28, 30
Klebe v. *United States*, 263 U. S. 188 ..... 12, 28, 33
Koch v. *Godshaw*, 75 Ky. 318 64
Langford v. *United States*, 101 U. S. 341 ..... 28, 30, 42
Lewisburg R. R. Co. v. *Hinds*, 134 Tenn. 293, 183 S. W. 985 71
Liggett & Myers Tobacco Co. v. *United States*, 274 U. S. 215 26
Mitchell v. *United States*, 267 U. S. 341 68
Monongahela Navigation Co. v. *United States*, 148 U. S. 312 68
Nantasket Beach Steamboat Co. v. *United States*, 297 Fed. 656 50
New York Life Ins. Co. v. *Pope*, 24 Ky. L. Rep. 485, 68 S. W. 851 76
North Coast R. Co. v. *A. A. Kraft Co.*, 63 Wash. 250, 115 Pac. 97 61
Omnia Co. v. *United States*, 261 U. S. 502 68
Pearson v. *United States*, 267 U. S. 423 ..... 28, 29
Pennell v. *United States*, 162 Fed. 75 50
Phelps v. *United States*, 274 U. S. 341 ..... 26, 60
Raleigh & G. R. R. Co. v. *Reid*, 64 N. C. 155 49
Rochester Lantern Co. v. *The Stiles and Parker Press Co.*, 135 N. Y. 209, 31 N. E. 1018 64
Russell v. *Sebastian*, 233 U. S. 195 49
Russell Co. v. *United States*, 261 U. S. 514 53
Santa Ana v. *Harlin*, 99 Cal. 538, 34 Pac. 224 72
Seaboard Air Line Ry. v. *United States*, 261 U. S. 299 ..... 19, 25, 26, 53
Sharp v. *United States*, 191 U. S. 341 ..... 70, 71
Sheckels v. *District of Columbia*, 246 U. S. 338 25
Shoshone Tribe v. *United States*, 299 U. S. 476 ..... 14, 15, 16, 26, 35, 38, 39, 40, 42, 52
Shurtleff v. *Occidental Bldg. & Loan Ass'n*, 105 Neb. 557, 181 N. W. 274 76
Slidell v. *Grand Jean*, 111 U. S. 412 49
Smyth v. *United States*, 302 U. S. 329 ..... 25, 26
Sommers v. *Commissioner of Internal Revenue*, 63 F. (2d) 551 71
Squaw Island Freight Terminal Co. v. *United States*, 89 C. Cls. 269 ..... 19, 54
Telfener v. *Russ*, 145 U. S. 522 64
Tempel v. *United States*, 248 U. S. 121 ..... 14, 28, 31, 33
Tillson v. *United States*, 100 U. S. 43 ..... 18, 25, 50, 51
Torkomian v. *Russell*, 90 Conn. 481, 97 Atl. 760 48
Tulley v. *Tranor*, 53 Cal. 274 48
United States v. *Behan*, 110 U. S. 338 69

Cases—Continued. Page

United States v. *Benedict*, 261 U. S. 294 26
United States v. *Carver*, 278 U. S. 294 68
United States v. *Creek Nation*, 295 U. S. 103 ..... 14, 15, 16, 26, 35, 38, 39, 40, 41, 43, 52
United States v. *Cress*, 243 U. S. 316 31
United States v. *Commonwealth Line*, 278 U. S. 427 ..... 25, 50
United States v. *Cumming*, 130 U. S. 452 49
United States v. *Great Falls Manufacturing Co.*, 112 U. S. 645 32
United States v. *Klamath Indians*, 304 U. S. 119 26
United States v. *Lynah*, 188 U. S. 445 ..... 13, 14, 27, 31, 32, 34
United States v. *North American Co.*, 253 U. S. 330 ..... 25, 27
United States v. *North Carolina*, 136 U. S. 211 25
United States v. *Rogers*, 255 U. S. 163 26
United States v. *Sherman*, 98 U. S. 565 25
United States v. *Verdier*, 164 U. S. 213 25
Virginia Engineering Co., Inc. v. *United States*, 89 C. Cls. 457 ..... 19, 51, 52, 54
Waite v. *United States*, 282 U. S. 508 52
West v. *Chesapeake & Potomac Tel. Co.*, 295 U. S. 662 47
Wire v. *Foster*, 62 Iowa 114, 17 N. W. 174 64
Witherbee v. *Meyer*, 155 N. Y. 446 69
Yearsley v. *Ross Constr. Co.*, 309 U. S. 18 ..... 32, 33, 34, 52

Statutes:
Judicial Code, Sec. 177 (28 U. S. C. §284) 10, 11, 18, 25, 26, 48, 49, 50, 84
Tucker Act (28 U. S. C. §41 (20)) 48, 49, 52
28 U. S. Code §269 72
Act of April 18, 1934, c. 150, 48 Stat. 1322 ..... 7, 45, 47, 83

Miscellaneous:
15 Amer. Juris. 400 ..... 18, 48
Black, *Interpretation of Laws* (1896) Secs. 315 *et seq* 49
17 Corp. Jur. 716 ..... 18, 48
Endlich, *Interpretation of Statutes* (1888), Secs. 304, 505 49
H. Rept. No. 828, 73d Cong., 2d Sess. 16, 45, 47
H. Rept. 1426, 72d Cong., 1st Sess. 47
McCormick on Damages (1935) 532–533 60
Orgel, *Valuation under Eminent Domain* (1936), p. 503 71
Sedgwick, Damages (9th ed. 1912):
Sec. 622 76
Sec. 984 60
S. Rept. No. 362, 73d Cong., 2d Sess. 16, 45, 47
Story on Agencies, Sec. 319 41
Sutherland, *Damages* (3d ed. 1903), pp. 36 *et seq* 48
Sutherland, *Statutory Construction* (1891) Sec. 199 49
Tiffany, *Landlord and Tenant* (1910) Sec. 67 60
Williston on Contracts (Rev. ed. 1937) Sec. 1411 76

In the Supreme Court of the United States

OCTOBER TERM, 1940

No. 191

THE UNITED STATES, APPELLANT

v.

KATE B. GOLTRA AND E. FIELD GOLTRA, JR., EXECUTORS OF THE ESTATE OF EDWARD F. GOLTRA, DECEASED

No. 192

KATE B. GOLTRA AND E. FIELD GOLTRA, JR., EXECUTORS OF THE ESTATE OF EDWARD F. GOLTRA, DECEASED, APPELLANTS

v.

THE UNITED STATES

ON APPEAL AND CROSS-APPEAL FROM THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the Court of Claims (R. 49–56) is not yet reported.

JURISDICTION

The judgment of the Court of Claims was entered April 1, 1940 (R. 56). The appeal of the United States (No. 191) was taken and allowed on June 19, 1940 (R. 57), and the cross-appeal (No. 192) was taken and allowed on June 25, 1940 (R. 62–63). This Court noted probable jurisdiction on October 14, 1940. The jurisdiction of this Court rests on the Act of April 18, 1934, c. 150, 48 Stat. 1322. See Appendix, pp. 83–84.[1]

QUESTIONS INVOLVED

The United States leased a number of towboats and barges to the plaintiff under an agreement reserving to the latter an option to purchase. The Secretary of War seized the vessels, the seizure, as the court below found, being tortious and unauthorized. This suit was brought against the United States under a special jurisdictional act.

1. The question on the appeal of the United States (No. 191) is whether interest is allowable against the United States either under the Fifth Amendment or by reason of the provision of the jurisdictional act conferring jurisdiction on the Court of Claims to "render judgment on the claims [of the plaintiff] for just compensation * * *."

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[1] In addition to the appeal and cross-appeal, the United States and the cross-appellants each also filed a petition for certiorari, against the contingency of the Court's holding that appeal would not lie. The Court has not acted on these petitions for certiorari.

2. The principal question on the cross-appeal (No. 192) is whether the damages awarded by the Court of Claims are inadequate.

STATUTES INVOLVED

The applicable portions of the statutes involved are set forth in the Appendix.

STATEMENT

On May 28, 1919, a contract was entered into between the United States, represented by the Chief of Engineers, and the plaintiff [2] providing for the lease to the plaintiff of nineteen barges and four towboats for a period of five years after the delivery of the first towboat or barge (Fdg. 6, R. 31, R. 15–20). The plaintiff agreed to operate the fleet as a "common carrier" on the Mississippi River and its tributaries for the period of the lease at rates "not in excess of the prevailing rail tariffs, and not less than the prevailing rail tariffs without the consent of the Secretary of War" (R. 16). The contract reserved to the plaintiff an option to purchase the vessels within three months prior to the expiration of the lease, or sooner (R. 18). The contract provided that the Chief of Engineers, as

[2] Upon the death of Edward F. Goltra, the original plaintiff, on April 2, 1939, his executors, Kate B. Goltra and E. Field Goltra, Jr., were substituted as parties plaintiff in the court below (Fdg. 1, R. 29), and are the appellees in No. 191 and cross-appellants in No. 192. Plaintiff, when used in this brief, refers to Edward F. Goltra or his executors. Defendant, when used herein, refers to the Government.

lessor, could terminate the lease at any time if, in its judgment, the lessee failed to comply with the terms of the agreement (Par. 8, R. 19–21).

No fixed rental was reserved for the period of operation under the lease. The contract provided, however, that all net earnings under the lease were to be deposited to the credit of the Secretary of War, and that the earnings should be applied to the payment of the purchase price in the event the lessee exercised his option to buy (R. 17–19). Sections 5 and 6 of the agreement made provision for the method of fixing the purchase price and for the method of payment if the plaintiff elected to purchase the fleet. The current value of the fleet was to be determined by appraisers appointed by the parties (R. 18). If the earnings deposited to the credit of the Secretary of War equalled the original cost of the ships plus 4% interest from the respective dates of delivery, the earnings were to be applied to payment in full for the fleet, any excess to be returned to the lessee (Par. 5 (a), R. 18–19). If the earnings were less than cost plus 4% interest, but greater than the appraised value, the fleet was to become the property of the lessee, and any earnings in excess of the appraised value were to be retained by the Government (Par. 5 (b), R. 19). If, however, the earnings were less than the appraised value, they were to be applied to payment of the fleet, and the lessee was to pay the amount by which the earnings fell short of the appraised value. The contract further provided

that the balance due on the purchase price after applying the earnings should be paid in fifteen equal annual installments with interest at 4% beginning one year from the date of the sale (Par. 6, R. 19).

The average original cost of each of the towboats was $375,000, and of the barges $110,000, a total of $3,590,000 (R. 66). The value of the fleet at the time of the seizure was approximately the same (R. 67).

On July 15, 1922, the fleet was delivered to the plaintiff by the Government (Fdg. 15, R. 34). The vessels were operated on a very limited scale (Fdgs. 17, 35, R. 35, 42), and on December 1, 1922, plaintiff placed the fleet in winter quarters (Fdg. 18, R. 36). On January 29, 1923, the District Engineer, pursuant to instructions from the Secretary of War, informed the plaintiff that various organizations interested in transportation on the Mississippi River had complained to the Secretary of War of the inactivity of the fleet, and that a failure to operate at maximum capacity would be regarded as a violation of the contract (Fdg. 20, R. 37–38). Subsequently, while the boats were still tied up, the Secretary of War, on March 3, 1923, notified the plaintiff that because he had failed to comply with the terms of the contract, the contract was terminated (Fdg. 23, R. 39). The plaintiff refused to redeliver the fleet to the designated official (Fdg. 25, R. 40). On March 25, 1923, pursuant to orders

of the Acting Secretary of War, the boats were seized and possession taken by the United States (Fdgs. 28, 29; R. 41). On April 27, 1923, the plaintiff was notified by the Chief of Engineers that in his judgment plaintiff had failed to comply with the terms of the contract and that therefore he was terminating it. The letter was signed at the direction of the Secretary of War and did not represent the judgment of the Chief of Engineers (Fdg. 38, R. 43–44).

Plaintiff brought suit to enjoin the Secretary of War from seizing the fleet, and possession of the vessels was temporarily restored to the plaintiff pursuant to court order entered on September 4, 1924 (Fdg. 39, R. 44). This suit was concluded by a judgment of this Court against the plaintiff (*Goltra* v. *Weeks,* 271 U. S. 536), and defendant resumed possession in the summer of 1926 (Fdg. 40, R. 44). In its opinion this court assumed that the Chief of Engineers, as lessor representing the United States had, without fraud, exercised his judgment in terminating the contract, and it held, on this assumption, that the contract had been lawfully terminated according to its provisions (Fdg. 40, R. 44). An amended complaint instituted by plaintiff was dismissed, in part on the ground that the decision of this Court was *res judicata. Goltra* v. *Davis,* 29 F. (2d) 257 (C. C. A. 8th), certiorari denied, 279 U. S. 843 (Fdg. 41, R. 44).

During both periods that the plaintiff was in possession of the vessels he operated at a loss (Fdg.

49, R. 45). The losses were due to the low water conditions (Fdgs. 17, 35, R. 35–36, 42), the substantial expenditures required to inaugurate service (R. 54, Fdgs. 43–48, 50–51, R. 45–46), litigation (R. 54), and the refusal of the Secretary of War to grant permission to the plaintiff to charge less than rail rates (R. 54, Fdgs. 8–14, R. 31–34).

This action was instituted in the Court of Claims on July 20, 1934, pursuant to the Act of April 18, 1934 (set out in the Appendix), which conferred jurisdiction on that court to hear, determine, and enter judgment upon the "claims of Edward F. Goltra against the United States for just compensation" for taking the vessels and unloading apparatus, whether "tortiously or not," and without regard to the statute of limitations, or to any previous court decisions.

In its petition below, the plaintiff pleaded as its first cause of action a breach or taking of the contract of May 28, 1919 (R. 1–11), and prayed for judgment on this claim in the amount of $10,150,419.04, plus interest (R. 12). In support of this claim, the plaintiff introduced evidence (R. 67–72, 73), and requested a finding (R. 68, 73) that at the time of the seizure the fleet had a remaining useful life of thirty years and that the rental value of the towboats was $\frac{1}{15}$ of one percent per day, and of the barges $\frac{1}{10}$ of one percent per day.

The Government introduced rebuttal evidence (R. 72–73), and requested the court below to find

that the remaining useful life was twenty years, and a rental value per day substantially smaller than that claimed by plaintiff (R. 69, 73).

As a second cause of action, the plaintiff alleged a breach or taking of a supplemental contract, which had been entered into by the parties on May 27, 1921 (R. 12–13, 21–22). Under this contract, the plaintiff provided a tract of land and concrete runways (Fdg. 50, R. 45–46), on which the United States constructed certain unloading apparatus at a cost of $210,000 for use in the plaintiff's operations under the lease (Fdg. 50, R. 46, 67). The contract permitted the plaintiff to purchase this apparatus on the terms and conditions governing the purchase of the fleet (R. 22). The plaintiff alleged that as a result of the breach or taking of the supplemental contract, the plaintiff lost the use of the unloading apparatus (R. 13) having a stipulated rental value of $25,000 annually (R. 67), that after the seizure of the apparatus it remained on plaintiff's land, plaintiff being deprived of the use and occupation of the land (R. 12), and that plaintiff employed watchmen to care for the apparatus (R. 13), incurring an expense in the stipulated amount of $125 per month for each watchman from the date of this Court's decision in *Goltra* v. *Weeks*, 271 U. S. 536 (R. 68). For these and other items of alleged damage, the plaintiff prayed for judgment on its second cause of action in the sum of $377,940.47, plus interest (R. 13).

he court below found that the Chief of Engineers had not exercised his own judgment in cancelling the contract, but had been coerced by Secretary of War into cancelling the contract sequent to the actual seizure of the vessels. It ordingly held that the contract had not been minated in accordance with its provisions, and the seizure of the vessels was tortious. The rt found that "Taking the amount of the nterclaims and all the relevant facts and circumces, including the expenses of plaintiff, into sideration, the value for the lease, option to purse, and all legal and equitable claims" was 0,000 as of the date of the seizure (Fdg. 56, 49, 55). To this amount, however, it added rest at six percent per annum "not as interest as a part of just compensation, from March 1923, to the date of payment."

oth parties appealed from the judgment. In 191, the Government assigns as error the alance of interest (R. 57), and in No. 192, the ntiff assigns as error the conclusion of the court w that there was no market value for the lease option to purchase the fleet (R. 62, 54), the ure of the court to consider evidence of the al value of the vessels (R. 62, 54), and the ure of the court to make certain findings of requested by plaintiff (R. 59–61), including, ng others, requested findings as to rental value he unloading apparatus (R. 61) and as to the

plaintiff's expenditures for watchmen (R. 61). For purposes of this appeal and cross-appeal, the parties have stipulated that the facts represented in the two requested findings mentioned, as well as in certain others, may be taken as true (R. 66–68), and the plaintiff now contends that the court erroneously excluded these two items from consideration in rendering its award.

SPECIFICATION OF ERRORS TO BE URGED[3]

The Court of Claims erred:

1. In holding that the Act of April 18, 1934, conferring jurisdiction upon it to entertain, hear, and render judgment on the claims of Goltra against the United States for just compensation for certain property taken, authorized it to award interest from the date of the alleged taking.

2. In holding that the use of the words "just compensation" in the Act called for the assessment of the same measure of damage as would apply to a taking of property by eminent domain.

3. In holding that the Act, in the absence of specific language expressly directing it so to do, authorized it to award interest.

4. In failing to hold that Section 177 of the Judicial Code precluded it from allowing interest on any claim against the United States prior to the time of the rendition of judgment.

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[3] This specification embraces only errors to be urged on the appeal of the United States, and not errors to be urged by the plaintiff on the cross-appeal.

5. In including in its judgment interest on the claim.

SUMMARY OF ARGUMENT

I

The Court of Claims erred in awarding interest from the date of the seizure of the vessels. Interest may not be recovered in a suit against the United States unless specifically provided for by contract or authorized by act of Congress (Judicial Code, Section 177), save that in eminent domain cases interest from the date of the taking is included in the recovery as a part of just compensation. *Jacobs* v. *United States,* 290 U. S. 13. There is no contention here that there was a contractual provision for interest, but the plaintiff claims interest on the grounds that his property was taken by eminent domain and that, in any event, the special jurisdictional act, by employing the phrase "just compensation," provides for the eminent domain measure of recovery, including interest.

A. There has been no taking of the plaintiff's property by eminent domain.

An unauthorized, and hence tortious, seizure or use of property by agents of the United States does not constitute an eminent domain taking by the United States. *Hughes* v. *United States,* 230 U. S. 24, 25. Further, it is laid down in the cases that a taking of possession of property on behalf of the United States under a claim of right to do so without paying compensation is not an eminent do-

main taking, whether the claim be well-founded or not. A seizure of property, under a claim that the United States is entitled to take possession by virtue of a contract, is not, for example, an eminent domain taking, *Klèbe* v. *United States*, 263 U. S. 188, 191. Here the vessels were seized and the lease was terminated by agents of the United States under the claim that the United States was entitled to repossess the vessels and to terminate the lease by virtue of the term of the lease agreement (R. 38–39; 41, 43–44). While we now concede that this claim was ill-founded, the fact that it was advanced precluded an eminent domain taking of the plaintiff's rights under the lease agreement. Further, since the seizure of the vessels was not in accordance with the contract it was not authorized by the United States, and there is also brought into play the rule that an unauthorized seizure of property by agents of the United States is not an eminent domain taking.

It is hence clear that the seizure of the vessels and the termination of the agreement did not constitute, at the time of the seizure and termination, an eminent domain taking, for which the United States was obligated to make just compensation under the Fifth Amendment. However, the plaintiff's contention that the initially tortious conduct was "adopted" by the United States at some subsequent date, and was thereby transformed into an eminent domain taking as from the beginning,

necessitates further exploration of the principle that assertion of a claim of right inhibits an eminent domain taking. That inquiry compels us to acknowledged that the broad proposition enunciated in the decisions, that a taking of property for the United States under a claim of right to do so without compensation is not an eminent domain taking, involves and is qualified by the assumption that the taking is authorized by Congress only if the claim of right is well founded. If, in other words, agents of the United States seize property on its behalf under claim of a right to do so without paying, and it appears not only that the claim was ill founded but that the seizure was authorized by Congress (expressly or impliedly) even though the claim of right should prove to be ill founded, the seizure constitutes an eminent domain taking. For in such a case it may be said that Congress in effect authorized the eminent domain taking of whatever private property rights might subsequently be found by the courts to have been invaded by the seizure. Cf. *United States* v. *Lynah*, 188 U. S. 445, 465–467, 468. If, on the other hand, it cannot be said that Congress authorized the seizure regardless of whether it would invade private rights, there is no basis for saying that Congress has impliedly authorized an eminent domain taking: in this situation the principle that a taking under claim of right to do so without paying is not an eminent domain taking has valid application.

With *United States* v. *Lynah, supra,* compare *Tempel* v. *United States,* 248 U. S. 121. In the present case there is no contention that Congress authorized the seizure of the vessels even if it was in violation of the lease agreement. Hence the seizure, since it was in violation of the lease agreement, was merely tortious, and affords no claim for just compensation under the Fifth Amendment.

In support of his claim that the tortious seizure was subsequently adopted by the United States, and thereby changed into an eminent domain taking *ab initio,* the plaintiff relies on findings of the court below that the vessels were seized for the use of the United States (R. 41) and that the United States has retained and operated them (R. 44). These findings do not, according either to precedent or principle, establish implied congressional ratification of the seizure. The only cases which we have found in which this Court has held that the United States had tacitly ratified a mistaken or otherwise unauthorized seizure of property by its agents are *United States* v. *Creek Nation,* 295 U. S. 103, and *Shoshone Tribe* v. *United States,* 299 U. S. 476. These cases involved unauthorized seizures of Indian lands by agents of the United States, resulting in the *Creek* case from an erroneously surveyed boundary and in the *Shoshone* case from a mistaken belief that the Indians had consented. Subsequent disclosure of these mistakes did not bring restoration of the Indian lands, and the Court held that

the United States had ratified the seizures. These tacit ratifications rested on two factors: First, that the United States was under an affirmative duty to protect the rights of its Indian wards, and, second, that Congress had determined to permit the disposals of the lands by the United States to stand, regardless of whether they were violative of the rights of the Indians.

The first of these elements, as well as the second, is, we submit, essential to any such implied ratification. For the United States is under no affirmative legal duty to protect ordinary citizens, fully capable of securing redress in the courts, from illegal acts of Government officials. *Gibbons* v. *United States,* 8 Wall. 269, 274. And the United States does not become liable for unauthorized acts of its agents merely because it retains the benefits of those acts. *Hooe* v. *United States,* 218 U. S. 322, 333–334.

But in any event the other constituent of an implied ratification is also lacking here, that is congressional approval of the seizure in disregard of whether the claim of right under which it was made was well-founded. That such congressional approval is prerequisite to an implied ratification is plain not only from the *Creek* and *Shoshone* cases but from the discussion, *supra,* of the nature of the claim of right doctrine. It was there shown that in order for a seizure under claim of right to consti-

tute an eminent domain taking, not only must the claim of right be ill-founded but Congress must have authorized the seizure even in that contingency. Hence for subsequent congressional action to transform into an eminent domain taking a seizure which initially lacked authorization, it would have to involve congressional approval of the seizure in disregard of whether the claim of right on which it was based was well-founded.

Here there has been no such congressional approval of the seizure of the vessels and of the termination of the plaintiff's rights under the lease agreement. There is no indication that Congress had any knowledge of this controversy before the plaintiff's jurisdictional bills came before it. The Jurisdictional Act does not purport to ratify a wrongful seizure and its legislative history shows that Congress intended only to give the plaintiff "a day in court." House Report No. 828, 73d Cong., 2d Sess.; Senate Report No. 362, 73d Cong., 2d Sess.

Hence the only possible basis for implying a congressional ratification is that Congress by enacting the jurisdictional act made available to the plaintiff monetary relief, instead of directing that if the plaintiff's claim were ultimately upheld a new lease agreement should be tendered to him. And to find a congressional ratification in an omission to proffer relief in kind would transform into

an eminent domain taking almost any wrong for the relief of which Congress provided.

B. The jurisdictional act does not authorize an award of interest against the United States.

That act confers jurisdiction on the Court of Claims to "render judgment on the claims of Edward F. Goltra against the United States for just compensation" for the taking of certain vessels, "whether tortiously or not". The plaintiff contends, and the court below apparently held (R. 55–56), that the act, by employing the term "just compensation," provides for the eminent domain measure of recovery, including interest, regardless of whether there was an eminent domain taking.

In the first place, it is probable that the words "just compensation" in the act are simply Goltra's description of his claims, and not a measure of recovery at all, for it is unlikely that Congress meant to do more than to give the plaintiff the same standing in the Court of Claims as any other claimant. But if "just compensation" is used to prescribe a measure of recovery, there is no basis for concluding that Congress used the words in their technical eminent domain sense as a back-handed way of providing for interest. The words "just compensation" are not words of art commonly importing an obligation to pay interest, nor are they used solely to refer to the eminent domain measure of damages: "just compensation" is widely used both by courts

and text writers to describe the measure of compensation in actions to recover damages for torts or breach of contract. See e. g. 15 Amer. Juris. 400; 17 Corp. Jur. 716. It is immaterial that the "just compensation" recoverable in actions between private parties for breach of contract may include interest, for Section 177 of the Judicial Code prohibits the allowance of interest against the United States except when expressly provided for by contract. The general jurisdictional grant in the Tucker Act is broad enough to permit interest in contract cases, but interest is denied because of the prohibition of Section 177. The grant of jurisdiction in the special jurisdictional act in this case is no broader, and is subject to the same limitation. Finally, we are here dealing with a private act, and it is a sound principle that such acts are to be strictly construed against the grantee. These acts are usually drawn by the interested parties and the rule of strict construction serves to defeat any concealed purpose of the draftsmen to accomplish an end not clearly apparent on the face of the statute. See *Tillson* v. *United States*, 100 U. S. 43, 46.

The court below allowed interest apparently on the theory that there is a history of judicial interpretation of the phrase "just compensation" in jurisdictional acts as meaning a measure of damages including interest, and that Congress was to be taken as having used the phrase in the present

jurisdictional act with this construction in mind. See R. 55–56; *Virginia Engineering Company, Inc.* v. *United States,* 89 C. Cls. 457, 471–472. But there is no such history of judicial interpretation. The cases relied on as showing such a history all involved eminent domain takings, and in eminent domain cases interest is included as required by the Fifth Amendment regardless of the phraseology of the jurisdictional act. See e. g., *Jacobs* v. *United States,* 290 U. S. 13, 17–18. Indeed the opinions in some of the eminent domain cases suggest that interest could not have been allowed under a jurisdictional act providing for "just compensation" had not the Constitution required it. See e. g., *Seaboard Air Line Ry.* v. *United States,* 261 U. S. 299, 304; *Jacobs* v. *United States,* 290 U. S. 13, 17. And in *Squaw Island Freight Terminal Co.* v. *United States,* 89 C. Cls. 269, the Court of Claims itself held that a statute conferring jurisdiction to pass upon "the claim of [the plaintiff] for just compensation" for loss of property caused by the negligence of Government officers did not authorize the allowance of interest, upon the ground that (p. 278) "There was no taking of plaintiff's property by the defendant for a public use within the meaning of the Fifth Amendment."

II

The court below gave due consideration to all relevant facts and evidence in rendering its award.

The plaintiff was not entitled to recover anything more than its expenditures under the contract. The court, however, awarded plaintiff $163,865.71 in excess of its expenditures, and the award is thus more than adequate.

A. The court properly refused to give effect to plaintiff's evidence as to the rental value of the fleet. Plaintiff's claims as to rental value were preposterous on their face. In any event, plaintiff's evidence as to rental value was irrelevant to the issues before the court.

1. The evidence as to rental value was not pertinent in connection with the breach of the agreement to lease. The accepted measure of damages for loss of possession under a lease, whether the claim is founded on breach of contract or a "taking" by eminent domain, is the difference between the market rental value of the property and the rent reserved under the lease. But in the present case the lease agreement had neither value to the plaintiff nor market value, because no profit could be made from the vessels operating under the conditions of the lease. The contract specifically required plaintiff to operate as a "common carrier" for the entire period of the lease or of any renewals at "not less than the prevailing rail tariffs" (R. 16, 31). Plaintiff did not show that any net earnings could have been realized operating under those terms. Plaintiff, at all times while he was in possession, operated at a loss (Fdg. 49, R. 45). And

all of the evidence introduced by the plaintiff as to market rental value was based on the assumption that the lessees could operate free of any common carrier and rail rates restrictions.

2. Market rental value was not pertinent in connection with the plaintiff's claim for damages for breach of the contract to sell. Damages for breach of a contract to sell consist of the difference between the market value of the property and the contract price, and the same measure is applicable in this case if the contract was taken under eminent domain. And it may be assumed that rental value may be considered as evidence of market value, where market value is an issue. In this case, however, there was no occasion to take evidence to determine market value, for the reason that the purchase was to be at appraised, or market, value. And market value is now stipulated. Hence rental value was and is wholly immaterial. The plaintiff points out that similar vessels could not have been secured in the open market, and argues that rental value is the measure of the "productive value" of the fleet for the period required for reproduction. But this scarcity factor was presumably taken into consideration in appraising market value, which is now stipulated and is the same as the purchase price.

In these circumstances the purpose of the evidence of rental value could only be to establish the profits which the fleet might have earned.

Rental value is inadmissible for this purpose, however, since such prospective profits could not be recovered, whether the seizure be considered a "taking" under eminent domain, a tort, or a breach of contract. The rule against recovery of prospective profits is of particularly sound application in the case of a new and speculative business, such as that on which plaintiff embarked.

3. These reasons for rejecting evidence of rental value apply with equal force to the evidence as to the offer of the Standard Oil Company to rent the vessels. Moreover, this offer was properly excluded on other independent grounds. This court has held that offers are so lightly made in circumstances involving no responsibility on either side that they cast no light on the question of value. They are merely expressions of opinion. The offer in this case was subject to the further objection that it was made more than two years after the seizure of the fleet.

B. The plaintiff is not entitled to any additional recovery on account of the four percent interest rate in the option provision. In order to secure a loan to finance the construction of a fleet similar to that here involved, plaintiff would have had to pay a higher interest rate than the four percent reserved in the contract, and plaintiff claims that his recovery should be augmented on this account. However, the court below in making its award presumably took into consideration the favorable interest rate in the option provision.

Moreover, assuming that plaintiff was damaged to the extent of the difference between the purchase price and the discounted value of the purchase price payable in fifteen annual installments at 4 percent interest, plaintiff has not shown that the discounted value was less than the purchase price. Under the doctrine of *Chesapeake & Ohio Ry.* v. *Kelly,* 241 U. S. 485, the discounted value or "present worth" is the sum which invested at the time of the breach would have yielded the fifteen annual installments plus 4 percent as those installments became due. For the purpose of this inquiry, the *Chesapeake* case holds, the assumed rate of return on the sum so invested is the rate of return of the "best and safest investments." Plaintiff has not shown that the return on the "best and safest investments" during the period in question was greater than 4 percent, and, in the absence of such a showing, the 4 percent interest rate of the contract affords no ground for recovery by the plaintiff.

Treating the agreement as one to loan plaintiff money at 4% in order to pay for the fleet, plaintiff might according to some decisions have recovered the excess cost of negotiating another loan, if he had negotiated one, or any damage resulting from his inability to purchase the fleet. But plaintiff did not negotiate another loan and it has been shown that he suffered no loss by reason of his failure to secure the fleet at the purchase price.

C. The court below was not required to consider the rental value of the unloading apparatus. Dur-

ing the period of the lease, plaintiff's right to use this apparatus was valueless because of the restrictive provisions of the lease. The rental value of the apparatus is not material on the question of damages caused by the breach of the agreement to sell, for the same reasons discussed in connection with the sale of the fleet. Moreover, the paintiff offered to waive all claims arising under the supplemental contract (which dealt with the unloading apparatus) except those for the use of plaintiff's land and the expense of watchmen, if the Government would convey the unloading apparatus to the plaintiff and deliver possession of the property on which it was located. The Acting Secretary of War replied that the United States claimed no interest in the apparatus or the land on which it was located, and that it waived any right it might be thought to have. The plaintiff treated this release as a compliance with the terms of his offer, and accordingly he may not now advance his claim for rental value of the apparatus.

The plaintiff's claim for expense of watchmen for the unloading apparatus is without merit. There is nothing to show that plaintiff was requested or expected by the Government to incur this expense.

D. The court below allowed the plaintiff $163,865.71 in excess of his expenditures. As we have shown, on strict principles of law the plaintiff's damage in addition to his actual expenditures was

only nominal. This award was, accordingly, too generous, but certainly plaintiff cannot object on that account.

ARGUMENT

I

THE COURT OF CLAIMS ERRED IN AWARDING INTEREST FROM THE DATE OF THE SEIZURE OF THE VESSELS

Section 177 of the Judicial Code (28 U. S. C. § 284) provides that "No interest shall be allowed on any claim up to the time of the rendition of judgment by the Court of Claims, unless upon a contract expressly stipulating for the payment of interest * * *." Accordingly, it is well settled that interest may not be recovered in a suit against the United States unless specifically provided for by contract or authorized by act of Congress.[4] Section 177 is, indeed, merely declaratory of the common law principle that interest does not run against a government in the absence of statute or contract evincing a contrary intention.[5]

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[4] *Cherokee Nation* v. *United States*, 270 U. S. 476, 487; *United States* v. *North American Co.*, 253 U. S. 330, 336; *United States* v. *Verdier*, 164 U. S. 213, 218; *Tillson* v. *United States*, 100 U. S. 43.

[5] *Boston Sand Co.* v. *United States*, 278 U. S. 41; *United States* v. *Commonwealth Line*, 278 U. S. 427; *Seaboard Air Line Ry.* v. *United States*, 261 U. S. 299, 304; *United States* v. *North American Co.*, 253 U. S. 330, 336; *United States* v. *North Carolina*, 136 U. S. 211, 216; *Angarica* v. *Bayard*, 127 U. S. 251, 260; *United States* v. *Sherman*, 98 U. S. 565, 567–568; *Smyth* v. *United States*, 302 U. S. 329, 353; *Sheckels* v. *District of Columbia*, 246 U. S. 338, 340.

An apparent exception to this rule is that in the case of a taking by eminent domain interest from the date of the taking is included in the recovery as a part of just compensation.[6] This is on the theory that the Fifth Amendment entitles the owner to the full market value of his property at the time of the taking: hence interest is included not as such but as a means of putting the condemnee in as good a position as he would have been in had he received compensation at the time of the taking.[7] "The allowance of interest in eminent domain cases is only an apparent exception, which has its origin in the Constitution." *Smyth* v. *United States*, 302 U. S. 329, 353.

The plaintiff does not contend that his contract with the United States stipulated for the payment of interest. Below he did not predicate any claim on the Fifth Amendment: here, however, he urges

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[6] *United States* v. *Rogers*, 255 U. S. 163; *United States* v. *Benedict*, 261 U. S. 294; *Seaboard Air Line Ry.* v. *United States*, 261 U. S. 299, 306; *Brooks-Scanlon Corp.* v. *United States*, 265 U. S. 106; *Liggett & Myers Tobacco Co.* v. *United States*, 274 U. S. 215; *Phelps* v. *United States*, 274 U. S. 341; *Jacobs* v. *United States*, 290 U. S. 13; *United States* v. *Creek Nation*, 295 U. S. 103, 111; *Shoshone Tribe* v. *United States*, 299 U. S. 476, 496.

[7] *United States* v. *Rogers*, 255 U. S. 163, 169; *Seaboard Air Line Ry.* v. *United States*, 261 U. S. 299, 306; *Jacobs* v. *United States*, 290 U. S. 13; *United States* v. *Creek Nation*, 295 U. S. 103, 111; *Shoshone Tribe* v. *United States*, 299 U. S. 476, 496; *United States* v. *Klamath Indians*, 304 U. S. 119.

that he is entitled to just compensation under the Fifth Amendment for an eminent domain taking. The plaintiff also contends, and the court below held, that the special jurisdictional act under which this suit was brought, by employing the phrase "just compensation," provides for the eminent domain measure of recovery, including interest, even if there was no eminent domain taking.

A. THE PLAINTIFF IS NOT ENTITLED TO JUST COMPENSATION UNDER THE FIFTH AMENDMENT

1. It is well settled that an unauthorized, and hence tortious, seizure, use or destruction of property by agents of the United States does not constitute a taking of property within the meaning of the Fifth Amendment, for which the United States must pay just compensation.[8] This principle is but an application of the general rule that the United States is not responsible for the unauthorized acts of its agents. See *Gibbons* v. *United States,* 8 Wall, 269, 274.

The doctrine has also been frequently enunciated by the Court that a seizure and use of property by officials under a claim of right advanced on behalf of the United States does not amount to an eminent

[8] *Hughes* v. *United States*, 230 U. S. 24, 35; *Hooe* v. *United States*, 218 U. S. 322; *Gibbons* v. *United States*, 8 Wall. 269; *United States* v. *North American Co.*, 253 U. S. 330, 333–334. Cf. *United States* v. *Lynah*, 188 U. S. 445, 465–466.

domain taking, whether the claim of right be well grounded or not.[9] While, as will be shown, the exact scope of the doctrine and its application in certain classes of cases are not entirely clear from the decisions, it plainly does apply here, and precludes any holding that there was an eminent domain taking. Decisive of the present case on this point is *Klebe* v. *United States,* 263 U. S. 188. In that case agents of the United States took possession of a steam shovel, contending that the contract for the construction project on which the shovel was being used authorized the United States to take over the shovel on the payment of a certain amount, which was tendered. The owner of the shovel had leased it to the contractor, and had agreed that it should be subject to the agreement between the contractor and the United States. The owner contended, nevertheless, that the United States was not privy to this arrangement with the contractor, and brought suit against the United States for the value of the shovel, on the theory that it had been taken for public use so that an

[9] *Klebe* v. *United States*, 263 U. S. 188; *Langford* v. *United States*, 101 U. S. 341; *Tempel* v. *United States*, 248 U. S. 121; *Pearson* v. *United States*, 267 U. S. 423; *Hill* v. *United States*, 149 U. S. 593; *Andrus* v. *United States*, 59 C. Cls. 851; *Kinkead* v. *United States*, 18 C. Cls. 504; *Jackson* v. *United States*, 27 C. Cls. 74; *Cadwalader* v. *United States*, 59 C. Cls. 533. Compare *Juragua Iron Co.* v. *United States* 212 U. S. 297; *Hijo* v. *United States*, 194 U. S. 315; *Castelo* v. *United States*, 51 C. Cls. 221.

mplied obligation to make just compensation rose. The Court held that no obligation to pay ust compensation could be implied since possession vas taken "under an asserted claim of right to do o by virtue of an express contract." 263 U. S. t 191. Whether this interpretation of the con-ract was sound was, the Court said, immaterial: f it was not sound the resulting wrong was ortious.[10]

The application of this case here is plain. The vessels were seized and the lease was terminated by agents of the United States under the claim that the United States was entitled to repossess the vessels and to terminate the lease by virtue of the terms of the lease agreement. See *supra*, pp. 5–6; R. 19–20, 38–39, 41, 43–44. While the Court of Claims has now held that the contract was not terminated in accordance with its provisions, and while the Government has not appealed from its decision in this respect, the undisputed fact that the Government's agents claimed to be acting under the contract inhibits any holding that there was an eminent domain taking. Further, since the seizure of the vessels by its agents was not in accordance with the contract, it was not authorized by the United States and was, as the court below held, tortious. Hence

[10] Accord: *Andras* v. *United States*, 59 C. Cls. 851; *Cadwalader* v. *United States*, 59 C. Cls. 533. Cf. *Pearson* v. *United States*, 267 U. S. 423.

there is also brought into operation the rule that an unauthorized seizure of property by agents of the United States does not constitute an eminent domain taking.

For these reasons it is clear that the seizure of the vessels and the termination of the agreement did not constitute, at the time of the seizure and termination, an eminent domain taking, for which the United States was obligated to make just compensation under the Fifth Amendment. Indeed, the plaintiff does not so contend. But the plaintiff does contend that the initially tortious seizure was "adopted" by the United States at some subsequent date with the result that the seizure was thereby transformed into an eminent domain taking as from the beginning (Br. in Opp., p. 11). This contention requires a further exploration of the principle that assertion of a claim of right precludes an eminent domain taking.

2. The Court early held that a seizure and use of property under a claim that title to the property is in the United States does not constitute a taking. *Langford* v. *United States,* 101 U. S. 341. Accord: *Kinkead* v. *United States,* 18 C. Cls. 504; *Jackson* v. *United States,* 27 C. Cls. 74; *Cadwalader* v. *United States,* 59 C. Cls. 533. Subsequently the Court held the *Langford* decision controlling in *Hill* v. *United States,* 149 U. S. 593. In that case the Government had constructed a lighthouse on submerged land in Chesapeake Bay, asserting that

the land was subject to the paramount right of the United States to use it for navigation works. The Court held that since this claim was made there was no eminent domain taking of the land, whether the claim was sound or not. The *Hill* case was in turn followed by the Court in *Tempel* v. *United States,* 248 U. S. 121. There the Government had dredged certain submerged land, under the belief that it was part of the bed of a navigable stream in its natural state, and so was subject to the paramount right of the United States to use it for navigation, a right which had been established by the decisions after the *Hill* case. The owner of the land, asserting that it was not part of the bed of the stream in its natural state, brought suit for just compensation. The Court held that the claim by the Government that the land was in the natural bed of the stream, whether sound or not, precluded an eminent domain taking.

Intervening between the *Hill* and *Tempel* decisions the Court decided *United States* v. *Lynah,* 188 U. S. 445, and *United States* v. *Cress,* 243 U. S. 316. In those cases the Government, under authorization of Congress, constructed dams which caused the plaintiffs' lands to be inundated by backwater. In both cases the Court held that the Government had taken the lands by eminent domain, although the Government advanced a claim of right, viz., that the lands inundated were held subject to a paramount right in the United

States for use for navigation. In accord with the *Lynah* and *Cress* decisions, see *Yearsley* v. *Ross Constr. Co.*, 309 U. S. 18, 21; *Hurley* v. *Kincaid*, 285 U. S. 95, 104–105.

The opinions in these cases do not contain a satisfactory reconciliation of the two divergent lines of decisions. The distinction properly turns, we think, on the breadth of the congressional authorization: the inquiry is whether Congress intended that the project be carried out even if it resulted in the invasion of private property rights. Or, more realistically, whether it appears that Congress would have authorized the project even if it had foreseen the possibility that the project might invade private rights. Where it may thus be said that Congress authorized a project to proceed regardless of invasion of private rights, it may, and indeed should, be said that Congress impliedly authorized the eminent domain taking of whatever private property rights might subsequently be found by the courts to have been invaded by the project. This is but another way of saying that in such circumstances an implied promise by the United States to make just compensation may be inferred. And it is an explicit basis of decision in the leading cases on this point that Congress in authorizing the project intended that it proceed regardless of resulting invasions of private rights. See *United States* v. *Lynah*, 188 U. S. 445, 465–467, 468; *United States* v. *Great Falls Manufacturing*

Company, 112 U. S. 645, 656; *Yearsley* v. *Ross Const. Co.*, 309 U. S. 18, 20. Cf. *Hurley* v. *Kincaid*, 285 U. S. 95, 103–104.

If, on the other hand, it cannot be said that Congress, when authorizing a project, intended that it proceed regardless of resulting invasion of private rights, there is no basis for saying that Congress has impliedly authorized an eminent domain taking. This, we think, is the sound basis of the decision in the *Tempel* case. In that case there was no express congressional authorization for dredging beyond the banks of the natural stream (248 U. S. at 124) and no reason to suppose that Congress contemplated any such thing. Hence there was no basis for concluding that Congress had impliedly authorized an eminent domain taking. The *Hill* case, on the other hand, is probably irreconcilable with the view represented by the *Lynah* case, since it seems reasonably clear that Congress would e authorized the construction of the lighthouse in that case even if it had understood that the construction might infringe upon private rights of property.

The principle which we thus derive from these cases is not limited to eminent domain takings claimed to have resulted from construction works, but is equally applicable to all cases involving the use or destruction of property by federal agents under claim of right. In the *Klebe* case, for example, if Congress had, either expressly or by im-

plication, authorized the Government's agents to take the steam shovel regardless of whether the United States was entitled to take it under the contract, the taking of the shovel would, if in violation of the contract, have been an eminent domain taking. Of course, Congress does not ordinarily authorize the Government's agents to violate contracts of the United States, and it would be going far to find any such implied authorization.

Thus the broad proposition found in the cases, that a taking of property for the United States under a claim of right cannot constitute an eminent domain taking, involves the assumption that the taking is authorized by Congress only if the claim of right is well founded. On this assumption, if the claim is not well founded the taking is unauthorized and tortious, and so not by eminent domain. But if, on the other hand, Congress authorized the taking regardless of whether the claim of right were fallacious, the taking would not be tortious, and it would, if the claim were unfounded, constitute an eminent domain taking. See *Yearsley* v. *Ross Constr. Co.*, 309 U. S. 18.

Applying these principles to the present case, the fact that the seizure of the vessels was under claim of right precludes any holding that it was an eminent domain taking, unless the seizure was authorized by Congress, expressly or impliedly, even if it was in violation of the lease contract. That, of course, is not the case, and no such con-

tention has ever been made. The seizure, since the claim of right was fallacious, was merely tortious, and grounds no claim for just compensation under the Constitution.

3. We turn then to the plaintiff's contention that the tortious seizure was "adopted" by the United States at some subsequent date, with the result that the seizure was thereby transformed into an eminent domain taking as from the beginning (Br. in Opp., p. 11). In support of this contention the plaintiff points to the findings of the Court of Claims that the vessels were seized "for the use and benefit of the United States" (R. 41), and that the United States has retained possession of the vessels and caused them to be operated as part of its barge service (R. 44). These findings do not, according either to precedent or principle, establish implied congressional ratification of the seizure.

In two Indian claims cases, but, so far as we have found, no other case, this Court held that the United States had tacitly ratified a mistaken or otherwise unauthorized seizure of property by its agents, and that the seizure was transformed by the ratification into an eminent domain taking as from the beginning, with the result that the United States was liable for interest as a part of just compensation from the time of the seizure. These cases are *United States* v. *Creek Nation,* 295 U. S. 103, and *Shoshone Tribe* v. *United States,* 299 U. S.

476. In the former case the Creek Nation ceded to the United States a portion of its lands, and later the United States assigned to the Sac and Fox Indians a part of the ceded lands which adjoined lands retained by the Creek Nation. In 1872, a government surveyor, in surveying the line between the Creek lands and the Sac and Fox lands, erroneously included certain lands of the Creeks in the Sac and Fox tract, with the result that the Sac and Fox Indians occupied them. Thereafter, by an agreement ratified by an Act of 1891, the Sac and Fox agreed to accept allotments in severalty, and that their remaining lands should be sold to settlers and the proceeds turned into the treasury as public money. In carrying out this Act the erroneous survey of 1872 was followed, and as a result the United States patented certain of the Creek lands erroneously included in the Sac and Fox tract to Sac and Fox Indians and sold most of the remainder of these Creek lands to settlers. Subsequently a government resurvey of the Creek boundary revealed the error in the 1872 survey, and thereafter the right of the Creeks to the lands was repeatedly recognized by Secretaries of the Interior and other officials in reports to Congress. Nevertheless, the Creeks were never restored to possession.

On these facts this Court held that the United States had confirmed the disposals of the Creek lands under the Act of 1891, so that the matter

stood just as if the United States had taken the lands by eminent domain at the time of those disposals. Accordingly, the Court held that the Creek Nation should recover the value of the lands at the times of the disposals, plus interest from those times. In holding that the United States had ratified the disposals, the Court said (295 U. S. at 110–111):

> True, the tribe, if free and prepared to proceed in its own behalf, might have successfully assailed the disposals; but it was not in a position where it could be expected to assume that burden. It was in a state of tutelage and entitled to rely on the United States, its guardian, for needed protection of its interests. Plainly the United States would have been entitled to a cancellation of the disposals had it instituted suits for that purpose. But, although having full knowledge of the facts, it made no effort in that direction. On the contrary, it permitted the disposals to stand—not improbably because of the unhappy situation in which the other course would leave the allottees and settlers. In this way the United States in effect confirmed the disposals; and it emphasized the confirmation by retaining, with such full knowledge, all the benefits it has received from them.
>
> We conclude that the lands were appropriated by the United States in circumstances which involved an implied under-

> taking by it to make just compensation to the tribe.[11]

Shoshone Tribe v. *United States*, 299 U. S. 476, is very like the *Creek* case on its facts. In 1878 the Commissioner of Indian Affairs settled a tribe of Arapahoe Indians on the reservation of the Shoshones. The Commissioner acted, initially at least, under the mistaken impression, stemming from his misapprehension of a subordinate's report, that the Shoshones had consented to receive the Arapahoes. But even after the Commissioner had been informed of his mistake he took no step to remove the Arapahoes, and in the years that followed succeeding Commissioners treated the two tribes as equal beneficiaries of the reservation, and they were eventually so treated in acts of Congress providing for cessions and for allotments in severalty of reservation lands.

In arguing the case the Government conceded that the settlement of the Arapahoes on the Shoshone reservation in 1878 was a violation of the rights of the Shoshones, and in its opinion the Court said (299 U. S. at 494):

> The treaty of 1868 charged the Government with a duty to see to it that strangers

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[11] Earlier in the opinion, in another connection the Court referred to "matters reflecting a confirmation of the acts of the administrative officers, such as the receipt by the United States of direct and material benefits from their acts and its retention of the benefits with knowledge of all the facts." 295 U. S. 103, 108.

> should never be permitted without the consent of the Shoshones to settle upon or reside in the Wind River Reservation. That duty was not fulfilled.

The Government contested the right to interest, however, on the ground that the jurisdictional act operated as an offer to the tribe by the United States to purchase a one-half interest in their lands as of the date of the appropriation, that the tribe accepted the offer by bringing suit under the jurisdictional act, and that the liability of the United States to the tribe was therefore contractual and not for just compensation under the Fifth Amendment. See 299 U. S. at 483. The Court did not notice this argument in its opinion; on the question of interest it merely repeated the doctrine of the *Creek* case that since the taking, though tortious in origin, was made lawful by relation, there was an appropriation within the Fifth Amendment for which the Government must pay just compensation.

As stated, so far as we have found the *Creek* and *Shoshone* cases are the only ones in which this Court has held that a mistaken seizure of property had been tacitly ratified by the United States so as to transform it into an eminent domain taking. *Crozier* v. *Krupp,* 224 U. S. 290, cited by plaintiff (Br. in Opp., p. 11), deals with an express, though blanket, statutory ratification, not with implied ratification. See 224 U. S. at 305, 307.

4. The holdings of this Court in the *Creek* and *Shoshone* cases that the United States had impliedly ratified the mistaken seizures were rested on two factors: first, that the United States was under a duty to protect the rights of its Indian wards, and, second, that Congress had determined to permit the disposals of the Indian lands to stand, regardless of whether they were violative of the rights of the Indians.

Both of these elements, the first as well as the second, are, we submit, essential to comprise any such implied ratification. This Court has several times held that the United States does not become liable for unauthorized acts of its agents merely because it retains the benefits of those acts. *Hooe* v. *United States,* 218 U. S. 322, 333–334; *Filor* v. *United States,* 9 Wall. 45, 49; *Hijo* v. *United States,* 194 U. S. 315, 323. In the first cited of these cases the Court pointed out that to hold otherwise would indirectly endow the agent with powers which had not been accorded him by Congress. 218 U. S. at 333–334.

It is no answer to say that the United States may reject benefits ensuing from unauthorized acts of its agents. It cannot reasonably be expected that Congress will remain constantly on the alert to repudiate any advantage to the United States so gained. The United States is under no legal duty to protect ordinary citizens, fully capable of obtaining redress in the courts, from illegal and unauthor-

ized acts of Government officials. The United States "does not undertake to guarantee to any person the fidelity of any of the officers or agents whom it employs, since that would involve it in all its operations in endless embarrassments, and difficulties, and losses, which would be subversive of the public interests." Story on Agencies, § 319, quoted with approval in *Gibbons* v. *United States,* 8 Wall. 269, 274.

The United States is, however, in a different position as respects the Indian tribes, which are its wards. As held in the *Creek* case, quoted *supra* p. 39, they are entitled to rely on the United States for protection, whether against the United States' own agents or against outsiders. As to such tribes the United States is under a duty to remain alert to check overreaching by its officials, and a failure to remedy such overreaching when brought to the attention of Congress may reasonably be regarded as authorization for the act of the official *ab initio.* But this duty, and consequently this basis for finding an implied ratification, exists only with respect to Indian tribes, because of their special status.

5. Even if the doctrine of appropriation *ab initio* by implied ratification is not thus limited, as we have suggested, to wrongs to Indian tribes, it plainly has no application here. We have shown that in order for a seizure of property under a claim of right to constitute an eminent domain taking, it must appear not only that the claim of

right was unsound, but that the seizure was authorized by Congress, expressly or impliedly, even though the claim of right should prove to be ill-founded. And subsequent congressional action, to transform into an eminent domain taking a seizure which initially lacked such authorization, would have to involve congressional approval of the seizure in disregard of whether the claim of right on which it was based was well-founded. For congressional approval of the seizure only if it were rightful would be supererogatory and would not supply the necessary congressional approval of the action in the contingency that the claim of right were ill-founded.

For example, the taking of possession of property by agents of the United States under a claim that title to the property was in the United States would not, without more, constitute an eminent domain taking, even if the claim of title were unsound. *Langford* v. *United States,* 101 U. S. 341. And for subsequent congressional approval of the seizure to supply this element of authorization, it would have to be congressional approval regardless of the validity of the claim.

The subsequent congressional approval in the *Shoshone* case met this test. There Congress chose to treat as rightful the Arapahoe occupation of the Shoshone reservation, although it knew that the Shoshones claimed that it was violative of their

rights. And the subsequent congressional approval in the *Creek* case went considerably beyond that. For while the original seizure of the Creek lands had been under claim of title for the United States, that claim had been wholly abandoned, and its mistaken character had been fully acknowledged by the competent executive authorities, and it was with these facts before it that Congress impliedly approved the continued possession of the Creek lands by the grantees of the United States. In the *Creek* case Congress thus approved the seizure not merely regardless of whether the title of the United States was good but with definite knowledge that it was not.

6. In the present case there has been no such congressional approval of the seizure of the vessels and of the abrogation of the plaintiff's rights under the lease. While the vessels have been used for the benefit of the United States since the seizure, appellees have made no attempt to show that Congress even had any nowledge of the circumstances of their use or of the controversy between Goltra and the United States before the jurisdictional bills came before it.

The jurisdictional act under which this suit was brought does not purport to ratify a wrongful seizure. The Act, it is true, speaks of property "taken, whether tortiously or not, * * * by the United States under orders of the Acting Sec-

retary of War, for the use and benefit of the United States * * *." But the words "whether tortiously or not" constitute a recognition that the seizure may have been unauthorized. It was so found below. If the question of the construction of the jurisdictional act be deemed a doubtful one, however, the principle (discussed *infra*) that private acts should be strictly construed suggests that any claim of ratification based on the statute should be rejected. And the legislative history plainly shows that Congress did not intend to ratify a wrongful seizure, but only to give the plaintiff "a day in court." When this case was before this Court in *Goltra* v. *Weeks*, 271 U. S. 536, on the plaintiff's suit for an injunction against seizure, the Court decided it against the plaintiff upon the assumption that the Chief of Engineers had exercised his judgment in good faith in terminating the contract for noncompliance. That issue had not, however, been litigated in the district court, and the plaintiff claimed (as the court below eventually held in the present suit) that the Chief of Engineers had not exercised his judgment in good faith. Subsequently, when the plaintiff sought to litigate that issue it was held to be barred by the decision of this Court. *Goltra* v. *Davis*, 29 F. (2d) 257 C. C. A. 8th), certiorari denied, 279 U. S. 843. Upon the basis of these facts the congressional committees recommended that the jurisdictional bill be passed solely to give the plaintiff his day in court upon this issue. For

this purpose it waived the bar of any statute of limitations or previous decisions. See House Report No. 828, 73d Cong., 2d Sess.; Senate Report No. 362, 73d Cong., 2d Sess. Nothing in this history suggests any purpose to ratify an unauthorized seizure.

Ultimately the only possible basis for inferring congressional approval of the seizure and of the abrogation of the plaintiff's rights under the contract is that Congress enacted the jurisdictional act, instead of providing that if the plaintiff's claim were ultimately upheld in the courts the vessels should be restored and a new lease tendered. The old lease has long expired and the vessels have undoubtedly deterioriated; in any event the suggestion could not be entertained that Congress approved the seizure, even if wrongful, merely because it omitted to proffer relief in kind. That would transform into an eminent domain taking almost any wrong for which Congress afforded relief.

B. THE JURISDICTIONAL ACT DOES NOT PROVIDE FOR AN AWARD OF INTEREST AGAINST THE UNITED STATES

The special jurisdictional act under which this suit was brought (set out *infra*, p. 83) confers jurisdiction upon the Court of Claims to "render judgment on the claims of Edward F. Goltra against the United States for just compensation to him for certain vessels and unloading apparatus taken,

whether tortiously or not, on March 25, 1923, by the United States under orders of the Acting Secretary of War, for the use and benefit of the United States; and any other legal or equitable claims arising out of the transactions in connection therewith: * * *"

The plaintiff contends that this act, by employing the words "just compensation," provides for the eminent domain measure of recovery, including interest, even if there was no eminent domain taking. And apparently it was on that theory that the court below included interest in its judgment. See R. 55–56.

In the first place, it is probable that the words "just compensation" in the act are simply Goltra's own description of his claims, and not a measure of recovery at all. The act, that is to say, describes Goltra's claims as for "just compensation to him" for the vessels and merely empowers the court below to "render judgment on the claims," without attempting to prescribe any rule for measuring Goltra's recovery, in the event that he should prevail. Nothing in the legislative history of the act indicates that it was the intent of Congress to prescribe any particular rule of damages, or that Congress ever gave any consideration to that question at all. The judiciary committees of both Houses concluded that the merits of Goltra's claims had never been passed upon, and stated that the sole purpose of the act was to give him his "day in

court." House Report 828, 73d Cong., 2d Sess.; Senate Report 362, 73d Cong., 2d Sess.; House Report 1426, 72d Cong., 1st Sess. In this absence of any evidence of any congressional intention to put Goltra in the preferred position of one whose property has been taken by eminent domain, it is unlikely that Congress meant to do more than give Goltra the same standing in the Court of Claims as any other claimant. The facts of the case do not disclose any reason which Congress might have wished to give Goltra special preference.

If, however, the jurisdictional act does use "just compensation" to describe Goltra's recovery, there is no reason to suppose that Congress used the words in their technical eminent domain sense as an indirect way of providing interest. The words "just compensation" are not words of art commonly importing an obligation to pay interest. The provision of the Fifth Amendment that private property shall not be taken for public use without "just compensation" is construed as requiring the inclusion of interest from the date of the taking in eminent domain cases. But even as used in the Amendment "just compensation" does not refer solely to the eminent domain measure of damages. It is also used to describe the right of a utility to a reasonable rate of return on the fair value of its property. See *West* v. *Chesapeake & Potomac Tel. Co.*, 295 U. S. 662, 671. And

"just compensation" is widely used both by the courts and by text writers to describe the measure of compensation in actions to recover damages for torts or breach of contract.[12] If Congress did use the words as descriptive of recovery, it used them presumably to refer to the measure of recovery appropriate to any claims which might be proved, including one for breach of contract or tort.

It is immaterial that the "just compensation" recoverable in actions between private parties for breach of contract may include interest in the discretion of the court. Section 177 of the Judicial Code prohibits the allowance of interest against the United States save as expressly provided for by contract. The general grant in the Tucker Act of jurisdiction "of all claims * * * founded * * * upon any contract, express or implied, with the Government of the United States, or for

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[12] See e. g., *Hetzel* v. *Baltimore & Ohio Railroad Co.*, 169 U. S. 26, 37; *Torkomian* v. *Russell*, 90 Conn. 481, 485, 97 Atl. 760; *Howey* v. *New England Nav. Co.*, 83 Conn. 278, 76 Atl. 469; *Tulley* v. *Tranor*, 53 Cal. 274, 280; Sutherland, *Damages* (3d ed. 1903), p. 36 *et seq.*

"The fundamental principle of the law of damages is that one injured by a breach of a contract or by a wrongful or negligent act or omission shall have fair and just compensation commensurate with the loss sustained." 15 Amer. Juris. 400.

"The primary object of an award of damages in a civil action, and the theory upon which it is based, is just compensation or indemnity for the loss or injury sustained by the complainant." 17 Corp. Jur. 716.

damages * * * in respect to which claims the party would be entitled to redress * * * if the United States were suable, * * *" is broad enough in terms to include interest where interest is recoverable in contract cases. Interest is denied, not because of any limitation in the general jurisdictional grant, but because of the prohibition of Section 177. The grant of jurisdiction in the special act here involved, which is certainly no broader than that contained in the Tucker Act, is subject to the same limitation.

Finally, we think it decisive of this phase of the case that we are here dealing with a private act passed for the particular benefit of a single individual. It is a sound and well-established principle that such acts are to be strictly construed against the grantee.[13] Such acts are usually drafted by the interested parties, and the rule of strict construction serves to defeat any purpose of the draftsmen, concealed by the skillful use of terms, to accomplish an end not clearly apparent on the face

[13] See Endlich, *Interpretation of Statutes* (1888) §§ 304, 505; Sutherland, *Statutory Construction* (1891) § 199; Black, *Interpretation of Laws* (1896) § 315 *et seq.* See also *Russell* v. *Sebastian*, 233 U. S. 195, 205; *Coosaw Mining Co.* v. *South Carolina*, 144 U. S. 550, 562; *Slidell* v. *Grand Jean*, 111 U. S. 412, 438; *Dubuque & Pacific R. R. Co.* v. *Litchfield*, 23 How. 66, 88; *Raleigh & G. R. R. Co.* v. *Reid*, 64 N. C. 155, 158; *Altrinchain Union* v. *Cheshire Lines Committee*, L. R. 15 Q. B. D. 597, 603. Cf. *United States* v. *Cumming*, 130 U. S. 452.

of the statute. Thus in *Tillson* v. *United States*, 100 U. S. 43, the Court, speaking through Chief Justice Waite, said (p. 46):

> We have no doubt it was the wish of those who procured the passage of the special statute under which the Court of Claims took jurisdiction of this suit, to obtain from Congress authority for that court to give a judgment against the United States at least for interest * * *. But if Congress had desired to grant such authority, it would have been easy to have said so in express terms; and because it did not say so, we are led irresistibly to the conclusion that it did not intend to give any such power.[14]

This rule of strict construction finds further support here in the presumption against implied repeal, for this case, of the general provisions of Section 177 of the Judicial Code prohibiting the

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[14] The special act in the *Tillson* case authorized the court to investigate the claim and "ascertain, determine, and adjudge the amount equitably due * * *." In *Boston Sand Co.* v. *United States*, 278 U. S. 41, 46, a special act empowered the court to adjudicate a collision case and to decree "for the amount of the legal damages * * * upon the same principle and measure of liability with costs as in like cases * * * between private parties." This language was held not to allow interest against the United States, although as between private parties it would have been recoverable. See also *United States* v. *Commonwealth Line*, 278 U. S. 427; *Nantasket Beach Steamboat Co.* v. *United States*, 297 Fed. 656 (D. Mass.); *Pennell* v. *United States*, 162 Fed. 75 (D. Me.).

allowance of interest by the Court of Claims. Cf. *Tillson* v. *United States*, 100 U. S. 43, 47.

The court below did not explain its award of interest in this case except by stating that it was awarded "not as interest but as a part of just compensation" and by citing its decision in *Virginia Engineering Company, Inc.* v. *United States*, 89 C. Cls. 457. In the *Virginia Engineering* case a statute authorizing the Court of Claims to determine the plaintiff's claim "and to award just compensation" for extra costs incurred at the request of a Government officer in the performance of a contract was held to require the allowance of interest. The court recognized that the plaintiff would only be entitled to the actual loss sustained in the absence of a special statutory provision but concluded (pp. 471–472) that the term "just compensation" entitled the claimant to the recovery of interest. The court said that Congress had employed the words "just compensation" in many other statutes, and that in every instance the courts had construed them as allowing the recovery of interest. Accordingly, the court held, Congress was to be taken as having used the words with this construction in mind.

There is no history of judicial interpretation of the phrase "just compensation" in jurisdictional acts as meaning a measure of damages including interest, in other than eminent-domain cases. In eminent-domain cases the phraseology of the juris-

dictional act is of course immaterial: interest is included as required by the Fifth Amendment even if the suit is brought under the Tucker Act, which prohibits interest, or under a special jurisdictional act which contains no mention either of interest or of just compensation. See e. g. *Jacobs* v. *United States,* 290 U. S. 13, 17–18; *United States* v. *Creek Nation,* 295 U. S. 103, 105, 111–112; *Shoshone Tribe* v. *United States,* 299 U. S. 476, 484–485, 496–497; *Waite* v. *United States,* 282 U. S. 508.[15] And aside from eminent-domain cases neither the court below in the *Virginia Engineering* case nor appellees in their brief in opposition cite any case construing the words "just compensation" in a jurisdictional act as providing for the recovery of interest.

On the contrary, every case cited by appellees or by the court below in the *Virginia Engineering* opinion arose under one or another of the statutes enacted during the World War to provide for the exercise of the federal eminent-domain power in connection with the national war effort. These statutes authorized the President to requisition property for war needs, and to modify, suspend, cancel or requisition contracts of certain types, directed him to pay "just compensation" therefor, and provided that the United States might be sued for any balance necessary to make up "just com-

[15] That the *Waite* case involved an eminent-domain taking, see *Crozier* v. *Krupp,* 224 U. S. 290, 304–305, and *Yearsley* v. *Ross Constr. Co.,* 309 U. S. 18, 22.

pensation." The opinions of this Court allowing interest against the United States in suits for takings of property under these statutes rest, clearly and explicitly, on the Fifth Amendment, not on the provisions in the acts for "just compensation."[16] So much so that they suggest that interest would not have been allowed had the right to it depended on the statutes. Certainly the Court did not treat the phrase "just compensation" as equivalent to a provision for interest. In the leading case, *Seaboard Air Line Ry.* v. *United States,* 261 U. S. 299, 304, it said:

> Section 10 of the Lever Act authorizes the taking of property for the public use on payment of just compensation. There is no provision in respect of interest. Just compensation is provided for by the Constitution and the right to it cannot be taken away by statute. Its ascertainment is a judicial function. * * *

And in *Jacobs* v. *United States,* 290 U. S. 13, 17, in describing the *Seaboard* decision, the Court said:

> That suit was brought by the owner under § 10 of the Lever Act, which, in authorizing the President to requisition property for public use and to pay just compensation, said nothing as to interest. But the Court

[16] Under these statutes the cancellation by the United States of a contract to which it was a party was held to be not a breach of contract but an eminent-domain taking. See *Russell Co.* v. *United States,* 261 U. S. 514, 523.

> held that the right to just compensation could not be taken away by statute or be qualified by the omission of a provision for interest where such an allowance was appropriate in order to make the compensation adequate. * * *

Not only is the statement of the court below in the *Virginia Engineering* case, that "just compensation" had come to have a well understood meaning in jurisdictional acts as permitting the recovery of interest, thus wholly without affirmative support in the cases, but it is strikingly refuted by the decision of the court below itself in *Squaw Island Freight Terminal Co.* v. *United States*, 89 C. Cls. 269, decided about six months before the *Virginia Engineering* case. In the *Squaw Island* case the Court of Claims held that a statute conferring jurisdiction to pass upon "the claim of [the plaintiff] for just compensation" for loss of property caused by the negligence of Government officers did not authorize the allowance of interest, upon the ground (p. 278) that "There was no taking of plaintiff's property by the defendant for a public use within the meaning of the Fifth Amendment."

II

The Court of Claims Gave Due Consideration to All Relevant Facts and Evidence in Rendering Its Award

The Court of Claims found that "Taking the amount of the counterclaims and all the relevant

facts and circumstances, including the expenses of plaintiff, into consideration, the value for the lease, option to purchase, and all legal and equitable claims * * * is $350,000" (Fdg. 56, R. 49, R. 55). This sum, the court stated, constituted "a jury award" after "Taking all the relevant facts into consideration" (R. 55). The plaintiff's expenses under the contract, as found by the court, totaled $193,736.99,[17] and the Government's counterclaims amounted to $7,602.70 (Fdgs. 54 and 55, R. 47–49). The balance of the award, $163,865.71,[18] presumably represents a "jury" estimate of the

[17] The court did not itself total the items of expense, but found individually the following expenses:

Installation of oil burner for "Illinois" (Fdg. 43, R. 45)	$6,414.28	
Repairs for "Illinois" (Fdg. 43, R. 45)	1,027.23	
Repairs for "Illinois" (Fdg. 43, R. 45)	732.11	
Coal burner for "Minnesota" (Fdg. 45, R. 45)	7,140.89	
Supplies of plaintiff on "Illinois" (Fdg. 46, R. 45)	5,038.44	
Replacements by plaintiff (Fdg. 47, R. 45)	79,474.52	
Insurance (Fdg. 48, R. 45)	21,017.73	
Insurance (Fdg. 48, R. 45)	30,830.30	
Construction of runways (Fdg. 50, R. 45–46)	36,061.49	
Reasonable rental value of land provided for runways and loading facilities (Fdg. 51, R. 46)	6,000.00	
Total		$193,736.99

[18] The computation is as follows:

Amount of award	$350,000.00	
Government's counterclaim	7,602.70	
Total recovery by plaintiffs		$357,602.70
Less plaintiff's expenses		193,736.99
Amount of award in excess of expenses		$163,865.71

"value for the lease, option to purchase, and all legal and equitable claims."

On his cross-appeal (No. 192), the plaintiff chiefly contends that the court below erred in arriving at its award (1) in failing to consider the rental value of the fleet and (2) in failing to give sufficient account to the difference between the interest rate payable under the contract on the unpaid balance of the purchase price and the interest rate which the plaintiff would have had to pay to secure a loan to purchase a similar fleet at the price fixed by the contract.

Under the contract, the plaintiff was entitled to possession of the fleet for the duration of the lease and had an option to purchase the fleet for an amount equal to the original cost of the vessels, i. e. $3,590,000, which option the plaintiff attempted to exercise. And the contract permitted the plaintiff to pay for the fleet out of earnings under the lease, the balance due, if any, to be paid in fifteen equal annual installments with interest at 4%. The plaintiff contends, and it is not controverted, that at the time of the seizure it would have been impossible to procure a fleet of similar barges in the open market, that such vessels could not have been built in less than two years, and that, if a loan had been negotiated for a sum sufficient to finance construction of similar vessels, the borrower would have been required to pay interest at a rate in excess of 6%. Finally,

according to the plaintiff's evidence (controverted by that of the Government), the fleet could have been leased by plaintiff at a net rental in excess of $1,100,000 annually. On this basis the plaintiff calculates that the rental value of the fleet for the unexpired period of the five year lease exceeded the cost or purchase price of the vessels by $750,000; that the "productive value" of the fleet merely for the period which would have been required to reproduce the fleet was more than $2,800,000; and that the total rental value of the fleet for fifteen years, a period less than its remaining life, was almost $14,000,000 in excess of the purchase price. And the plaintiff contends that under established principles governing the measure of just compensation and the provisions of the contract, the court should have considered this "productive" or rental value of the fleet, and also the favorable interest rate, in making its award for the taking of the lease and option to purchase.

The plaintiff makes a similar claim with respect to the unloading apparatus constructed by the Government on plaintiff's land pursuant to the supplemental contract. Plaintiff also contends that the court erroneously failed to consider the sums paid by plaintiff since July 1926 for watchmen to care for the unloading apparatus left on plaintiff's land after the seizure.

Each of these contentions is without substance. The plaintiff was not entitled to recover anything more than his expenditures under the contract. Moreover, while the court stated that it did not consider plaintiff's evidence of rental value, it did award the plaintiff more than $160,000 in excess of his expenditures, and this award presumably embraced consideration of the other claims which the plaintiff is asserting here.

A. THE COURT WAS WARRANTED IN REFUSING TO GIVE EFFECT TO PLAINTIFFS EVIDENCE AS TO THE RENTAL VALUE OF THE FLEET

The plaintiff's evidence of rental value (R. 67–72) consisted of expert opinions and of an offer to rent made by the Standard Oil Company some two years after the seizure of the vessels. (This offer is separately discussed, *infra*.) The court below made no finding as to rental value, and in its opinion it disposed of it as follows (R. 54):

> It is contended by the plaintiff that, in arriving at just compensation, an offer to rent the fleet made years after the fleet had been seized and the rental value of similar vessels on the Mississippi River should be taken into consideration. These contentions cannot be sustained. [Citing cases.]
>
> There were no other towboats and barges on the Mississippi River at that time which could have been rented. There was no market value for the lease and option to purchase. * * *

Thus it may be that the court refused to consider rental value because no persuasive or credible evidence of rental value had been introduced. Certainly the extreme character of plaintiff's evidence as to rental value was itself sufficient reason to ignore it. In *The Conqueror*, 166 U. S. 110, 134, this Court observed:

> The yacht cost originally $75,000. The proposition that her use for a little more than five months, during the autumn and winter, should be worth to her owner $15,000 over and above all her expenses, for which a separate allowance was made, is putting a strain upon our credulity which we find ourselves quite unable to bear.

But however this may be, and assuming that credible evidence of rental value was before the lower court, the evidence was still, as a matter of law, wholly irrelevant to the issues before the court. The plaintiff's contention that the court should have considered his evidence of rental value may be discussed in two connections; first, in relation to the damage alleged to have been caused by breach of the agreement to lease, and secondly, in relation to damages claimed for breach of the agreement to sell the fleet at plaintiff's option.

1. *The plaintiff's evidence of rental value was not pertinent in connection with the breach of the agreement to lease.*—The accepted measure of damages or "just compensation" for loss of possession under a lease is the difference between the market

rental value of the property and the rent reserved, and this is so whether the claim is founded on breach of contract or a taking under eminent domain.[19] In this case, however, no specific rent was reserved. The plaintiff was required to pay over all net earnings to the Secretary of War for deposit in a special account (R. 17-18, 31). The contract, it is true, permitted plaintiff to apply its net earnings as lessee to the payment of the purchase price of the fleet (R. 18–19, 31), and it may be assumed for purposes of argument that any sum which could have been earned under the lease should be credited to the plaintiff as damages for breach of the lease. But no evidence was introduced to prove that a profit could have been earned operating under the conditions of the lease, and it is reasonably clear that no such showing could have been made.

The agreement specifically required the plaintiff to "operate as a common carrier" for the entire period of the lease and of any renewals, and at rates "not less than the prevailing rail tariffs without the consent of the Secretary of War" (R. 16, 31). The Secretary was authorized to permit the plaintiff to relax both the common-carrier and the rates requirement, but was certainly not required to do so (R. 16, 31). In fact, the Secretary never

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[19] Tiffany, *Landlord and Tenant* (1910), sec. 67; Sedgwick, *Damages* (9th ed. 1912), sec. 984; McCormick on Damages (1935) 532–533; *Phelps* v. *United States*, 274 U. S. 341; *Des Moines Wet Wash Laundry* v. *City of Des Moines*, 197 Iowa 1082, 198 N. W. 486.

relaxed the common-carrier requirement. Moreover, the Secretary ultimately refused to permit plaintiff to charge less than rail rates save for a limited class of commodities not carried in competition with other Government-owned barges on the Mississippi River system (Fdgs. 8–10, R. 31–34). These restrictions may not be disregarded in valuing the lease. *North Coast R. Co.* v. *A. A. Kraft Co.*, 63 Wash. 250, 115 Pac. 97; cf. *Boston Chamber of Commerce* v. *Boston*, 217 U. S. 189.

Plaintiff did not and presumably could not show that any net earnings would have been realized operating under these restrictions. During the period of approximately three years that the plaintiff was in possession of the fleet (Fdgs. 34, 39, 40, R. 42, 44), he operated at a loss (Fdg. 49, R. 45). The loss was due in large part to unfavorable weather conditions (Fdg. 35, R. 42), to the necessity of making substantial expenditures in starting a new business, and to the uncertainty caused by litigation arising out of the seizure of the fleet, but it was also caused, as the court below observed, by the prohibition against charging less than rail rates (R. 54).[20] It is thus quite apparent that the lease agreement was without value to the

[20] In his brief filed with this Court in *Goltra* v. *Weeks*, 271 U. S. 536, the plaintiff asserted that shippers would not use barge service at the same rates charged by rail carriers, and that this was understood by the parties when the contract was entered into (Brief of Petitioner, at pp. 84–85).

plaintiff, for the reason that he could not earn a profit on his operation of the vessels under it.

The plaintiff's evidence as to rental value had no tendency to show that the plantiff could have made profits on the operation of the fleet, and was therefore utterly irrelevant, for the reason that it presupposed that the plaintiff's hypothetical lessees could operate the vessels free of any restrictions as to rates or as to common carrier service. The testimony as to the offer of the Standard Oil Company shows clearly that the Company contemplated operating the vesels for its own use (R. 67). The other evidence as to rental value, i. e., expert opinion, contains no reference to the common carrier and railroad rate restrictions and was likewise undoubtedly based on the assumption that the plaintiff's lessees would operate as private carriers for their own use or as private contract carriers without any restrictions as to rates or class of service.

It is unnecessary to press the point further. For, as we understand the plaintiff's argument, no contention is made that the hypothetical annual rental of more than $1,100,000, or any sum at all, could have been earned under the rail rate and common carrier requirements of the lease. Rather the plaintiff's theory appears to be that if his option to buy the fleet had been honored he, as purchaser of the fleet, could have leased it free from the common carrier and rail rate restrictions, that on this basis the earnings of the fleet would have been more

than sufficient to pay the purchase price in the manner provided by the contract together with interest at 4%, and that the court below should therefore have considered the rental value of the vessels, either for the period required to reproduce a similar fleet, or for the duration of the first five-year term of the lease, or indeed for the entire remaining life of the vessels. In brief, plaintiff's fundamental position is that rental value should have been considered in determining the damage caused by breach of plaintiff's option to purchase. To this contention we now turn.

2. *There was no occasion to consider rental value in connection with the breach of the option to buy.*—Even assuming, as the plaintiff assumes, that the common carrier and rail rate restrictions would have been removed as soon as the plaintiff opted to buy, and before payment of the entire purchase price,[21] the court below was correct in excluding rental value from consideration in fixing the value of the option to purchase.

It is elementary that the measure of damages for breach of a contract to sell is the difference between the market value of the property contracted for and the contract price. *Harten* v. *Loffler*, 212 U. S.

[21] This construction of the contract may be too favorable to plaintiff, since under it plaintiff could have avoided the restrictions of the lease and his obligation of maintenance at any time by electing to purchase, even though the Government expressly reserved title until all payments were completed (R. 18).

397; *Telfener* v. *Russ,* 145 U. S. 522; *Rochester Lantern Co.* v. *The Stiles and Parker Press Co.,* 135 N. Y. 209, 31 N. E. 1018. And in this case the same measure is applicable even though it be assumed that the contract was taken under eminent domain. The measure of recovery on this assumption is the amount which could have been secured for an assignment of the agreement (*De Laval Co.* v. *United States,* 284 U. S. 61, 71–72), and where, as here, the purchaser has a right to secure delivery of the vessels on the date of the "taking," the assignment value is the difference between the purchase price and the market value. And it may be assumed that rental value may be considered as evidence of market value where there is occasion to determine market value, as where the difference, if any, between the market value and the purchase price is an issue of fact which must be determined by evidence. In this case, however, there was no occasion to determine market value, for the reason that under the provisions of the contract and the stipulated facts, the market value and the purchase price of the fleet are identical. The purchase was to be at market value; hence there was no possible damage from the breach of the contract to sell, and no occasion to determine market value. *Koch* v. *Godshaw,* 75 Ky. 318; *Wire* v. *Foster,* 62 Iowa 114, 17 N. W. 174.

The contract contained the following provisions for computing the purchase price if the plaintiff

opted to purchase: (1) if the net earnings under the lease equalled or exceeded the original cost of the vessels, the earnings were to be applied to payment in full, and excess to be returned to plaintiff (Par. 5 (a)); (2) if the earnings were less than the original cost but in excess of the appraised value as determined by appraisers appointed by the parties, the earnings were to be applied to payment in full, the Government to retain any sum in excess of the appraised value (Par. 5 (b)); (3) but if the earnings were less than appraised value, the plaintiff was required to pay the full appraised value (Par. 5 (c)). Thus, if the earnings were equal to or in excess of appraised value or cost, plaintiff was entitled to purchase the fleet for cost or appraised value, whichever was less, but if the earnings were less than either cost or appraised value, the plaintiff was obligated to pay the full appraised value.

No provision was made permitting plaintiff to pay only cost if the cost were less than appraised value and the net earnings were less than either. The Government may have considered that the principal purpose of the contract from its standpoint was to secure a demonstration of the feasibility of common carrier operations on the inland waterways and, in the event that object was attained, been willing to dispose of the fleet at cost or appraised value whichever was less, but may have been unwilling to sell the property to plaintiff (or to any private or contract carrier) for less

than full commercial value if the demonstration purpose failed of achievement. Or the parties may have assumed that in the event the operations were unsuccessful, the property would be of less value than its cost.

At all events, the plaintiff, like the Government, apparently construes the contract to require payment of the full appraised value where the earnings were less than cost or appraised value, regardless of whether the latter was in excess of the cost. For the plaintiff has not urged that the appraised value at the time of the breach was greater than the original cost. To the contrary, in the court below the plaintiff requested a finding and on this appeal the parties have stipulated that the value of the vessels during the period from 1922 to 1924, when plaintiff attempted to exercise its option, "was approximately the same as the original cost thereof" (R. 67, 59).[22]

Since the contract required plaintiff to pay the appraised value of the fleet if cost and appraised value were the same, the market value and the purchase price of the vessels were identical: there can be no question but that "appraised value" and

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[22] In view of the stipulation the evidence on which this requested finding was based was not included in the record on this appeal, but it seems fair to say that the evidence was introduced by plaintiff. The plaintiff's purpose of course, was to establish the purchase price to be deducted from the value of the fleet in fixing the amount of the award for the seizure of the vessels.

"market value" are one and the same. In these circumstances, the market value of the vessels, and hence estimated rental value to show market value were obviously immaterial. Since purchase was to be at market value, there was neither damage from breach of the contract to sell, nor occasion to determine market value. The latter conclusion may also be reached somewhat differently: it is stipulated that market value was the same as original cost, i. e., $3,590,000; hence the refusal of the court below to consider rental value to establish market value is now academic.

The plaintiff points out that vessels of the type in question could not have been secured on the open market (R. 67), and argues that rental value should have been considered as a measure of the "productive value" of the fleet for the period required for construction of similar vessels. The short answer is that the scarcity factor was one element to be considered in appraising the market value of the fleet at the time plaintiff elected to purchase, and presumably was taken into consideration in plaintiff's requested finding of fact, now stipulated, that the value of the fleet during the years 1922 to 1924 was the same as its original cost.

Since evidence of rental value is thus irrelevant on the question of the value of the fleet, in view of the fact that the market value and purchase price of the fleet were identical, there remains only the question whether such evidence is admissible to

establish the prospective profits of the enterprise. Evidence of rental value is inadmissible for this purpose, however, since prospective profits cannot be recovered. If, as the plaintiff contends, the seizure of the vessels constituted a taking under eminent domain, no award can be made for the profits which could have been earned by operating the fleet. *Mitchell* v. *United States,* 267 U. S. 341; *Joslin Co.* v. *Providence,* 262 U. S. 668; *Bothwell* v. *United States,* 254 U. S. 231. Such is the rule where tangible property is condemned, and the measure of damages certainly cannot be more liberal where the condemnee has only a contract to purchase the property. In neither case is there a "taking" of the profits. Cf. *United States* v. *Carver,* 278 U. S. 294, at 299–300; *Omnia Co.* v. *United States,* 261 U. S. 502, 510. The case of *Monongahela Navigation Co.* v. *United States,* 148 U. S. 312, relied on by the plaintiff, is not in point, since the property there taken included a franchise of a going concern as well as physical property.

If, on the other hand, as the Government contends, the seizure constituted a breach of contract or tort, the conclusion is the same. In an action for breach of contract to sell property, the profits of the business for which the property was intended are deemed speculative and remote, particularly in the case of a new business, and cannot be recovered even though the intended use was known to the defendant. *Howard* v. *Stillwell &*

Bierce Mfg. Co., 139 U. S. 199; *United States* v. *Behan*, 110 U. S. 338; *De Ford* v. *Maryland Steel Co.*, 113 Fed. 72 (C. C. A. 4th); *E. W. Bliss Co.* v. *Buffalo Tin Can Co.*, 131 Fed. 51 (C. C. A. 2d); *Cramer* v. *Grand Rapids Show Case Co.*, 223 N. Y. 63, 119 N. E. 227.[23]

The present case demonstrates the wisdom of this rule. As the plaintiff averred in his complaint in the prior litigation, the attempts of the Government and others to carry freight by towboats and barges on the Mississippi had been unsuccessful prior to the execution of the agreement, and the parties understood at the time that the operations were "of necessity experimental in kind and required time in their development because of previous ineffective efforts to use the Mississippi River for similar purposes and because of the absence of current freight traffic of merchants and shippers on steamboats running upon the Mississippi River and the absence of public use and con-

[23] In the court below, plaintiff relied on a number of cases holding that where the seller delays delivery of chattels purchased for use in connection with the purchaser's business, and the delay results in loss of the use of other property employed in the business, the rental value of such other property may be considered in measuring the damage caused by loss of its use. *Griffin* v. *Colver*, 16 N. Y. 489, 496–497; *Witherbee* v. *Meyer*, 155 N. Y. 446, 449; *Boyle* v. *Reeder*, 23 N. C. 607, 614; *Gas Co.* v. *Glass Co.*, 56 Kan. 614, 625, 44 Pac. 621, 624. In all of these cases, however, the loss of use was certain and not speculative, and rental value was a reasonable measure of the loss since the claimant was the owner of the property.

fidence in freight traffic on the Mississippi River." *Goltra* v. *Weeks,* October Term, 1925, No. 718, R. 15–16.

3. *The court properly refused to consider the offer of the Standard Oil Company to rent the vessels.*—What has been said as to the admissibility of evidence of rental value applies, of course, to the evidence as to the offer of the Standard Oil Company to rent the vessels. The testimony clearly discloses that the Standard Oil Company proposed to operate the vessels for its own use, without regard to any restrictions as to rates or class of service (R. 67). The proposed rental has no bearing, therefore, on the question of the damages caused by the breach or taking of the agreement to lease. Since the market value and purchase price of the vessels were identical, there was no occasion to consider such evidence to determine the value of the option to purchase. And since prospective profits are not recoverable, the evidence as to the offer to rent was not admissible to show prospective profits.

The offer was properly excluded on other grounds. This Court held such offers inadmissible in *Sharp* v. *United States,* 191 U. S. 341, 348–350. It is true that in the *Sharp* case the offer was not testified to by the offeror, but the decision was placed on the broad ground that "oral and not binding offers are so easily made and refused in a mere passing conversation, and under circumstances involving no responsibility on either side, as to cast no light upon the question of value"

(*id.* at 349). As the authorities cited by the plaintiff show, offers have sometimes been held admissible by the lower federal courts upon a satisfactory showing that the offer was made in earnest and that the offeror was fully capable of making payment. The language quoted by plaintiff from the opinion in the *Sharp* case (at p. 342) affords no basis for such rulings, and other courts have held that all such offers are subject to the rule of the *Sharp* case. *Sommers* v. *Commissioner of Internal Revenue,* 63 F. (2d) 551, 553 (C. C. A. 10th); *Clarke* v. *Hot Springs Electric Light and Power Co.,* 55 F. (2d) 612 (C. C. A. 10th). In principle it would seem that offers by third parties to buy the property in suit should be excluded "because they have not been consummated and at best are expressions of opinion unsupported by the payment of hard cash." Orgel, *Valuation Under Eminent Domain* (1936), p. 503. Moreover, this particular offer was made during the prior litigation, when, as the offeror knew, the plaintiff was unable to enter into any lease, and the offer was, therefore, not sufficiently trustworthy as evidence of value to be admissible even under the cases cited by plaintiff.

The offer was subject to the further objection that it was made more than two years after the seizure of the vessels, the controlling date in the assessment of damages, and furnished no evidence of rental value at the time the breach of contract occurred. *Lewisburg R. R. Co.* v. *Hinds,* 134 Tenn.

293, 183 S. W. 985; *Santa Ana* v. *Harlin*, 99 Cal. 538, 34 Pac. 224; *Crosby* v. *Dorward*, 248 Ill. 471; 94 N. E. 78. Since the court was required to assess the damages as of the date of the breach or "taking" (*cf.* Fdg. 56, R. 49), it was bound to determine the relevance of the offer as of that date without benefit of hindsight evidence that the rental value remained unchanged after that date. The fact that objection to the admission of the offer was not made before the Commission is immaterial. The statute authorizing the Court of Claims to appoint commissioners (28 U. S. C. 269) specifically authorizes the court to consider any objection whether or not an exception was taken at the hearing before the commissioner, and there is nothing in the rules of that court to the contrary. The decisions of the Court of Claims cited by plaintiff are not in point. All of them were decided before the enactment of the statute providing for commissioners. Moreover, as the court expressly recognized in one of the cases (*Camden Iron Works* v. *United States*, 47 C. Cls. 124, 128), the court had power to sustain the objection and declined to do so in those cases only because of special circumstances not material here.

B. PLAINTIFF IS NOT ENTITLED TO ADDITIONAL RECOVERY ON ACCOUNT OF THE FOUR PERCENT INTEREST RATE IN THE OPTION PROVISION

The provisions of the contract according the plaintiff an option to buy the vessels prescribed an initial payment of the deposited earnings and that

the balance be paid in fifteen annual installments, with interest at 4 percent per annum (R. 19). The plaintiff introduced evidence that in order to secure a loan to finance the construction of a similar fleet at a cost of $3,590,000, the loan to be repaid in fifteen equal annual installments, plaintiff would have been required to pay interest at the rate of 6.138%, as compared with the 4% reserved by the contract, and plaintiff contends that the difference in interest rates was an element of value which the court below should have considered in rendering its award.[24]

However, the court below presumably took into consideration the interest rate. The court's stated that it did not consider rental value (R. 54), but it did not state that it did not give any effect to the interest rate, and its findings recite that the recovery allowed takes into consideration all relevant circumstances, including "the value for the * * * option to purchase * * *" (R. 49). And we have shown that the option plainly had no value apart from the interest rate.

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[24] It may be observed in passing that, on the plaintiff's assertion as to rental value, Mr. Goltra could have realized a profit from rents of $13,280,045.46 by purchasing another fleet even at the increased cost of money, but this sum, although now deemed a reasonably reliable measure of damages, was apparently insufficient to induce Mr. Goltra to make the investment. The figure $13,280,045.46 is derived by subtracting the interest differential from $13,711,556.05, the rental value based on plaintiff's "interesting" reconstruction of the operation of the contract "in its entirety."

In any event the plaintiff has not shown any basis for recovery on account of the 4 percent interest rate. Under the accepted measure of damages for breach of a contract to sell property, the plaintiff is entitled to the amount, if any, by which the market value exceeded the purchase price. And since the purchase price was not to be paid immediately but over a period of fifteen years, it is necessary to determine the "present" or discounted value of the purchase price at the date of the breach or "taking" of the contract. Under the doctrine of *Chesapeake & Ohio Ry.* v. *Kelly,* 241 U. S. 485, the discounted value or "present worth" of the purchase price is the sum which, invested at the date of the breach or "taking" of the contract, would yield the fifteen annual installments plus 4% as the installments fell due. For the purposes of this inquiry, the *Chesapeake* case holds, the assumed rate of return on the sum so invested is not the "legal rate" of interest, but the earnings of the "best and safest investiments." This for the reason that any larger rate of return "is in part earned by the investor rather than by the investment" (*id.* at 490–491).

It is true that in the *Chesapeake* case the question presented was as to the measure of damages for loss of future support, but the principle is applicable here. The purchase price must be discounted to its equivalent at the date of the breach or taking; otherwise, indeed, the purchase price paid in installments at 4% interest would be actu-

ally greater than the market value at the date of the breach or "taking." And there is no basis in principle for assuming a different rate of return in ascertaining the "present worth" of a promise to pay money in the future than in determining the "present worth" of future earnings.

It seems clear, therefore, that if plaintiff had promised to pay in fifteen equal installments without interest, the plaintiff's damage would be the difference between $3,590,000 and the sum which invested at the "moderate return" (241 U. S. at 491) of the "best and safest investments" would yield $3,590,000 paid in fifteen annual equal installments. The plaintiff, however, promised to pay 4% on the unpaid balance. The inquiry, therefore, is whether the return on the safest investments is more or less than 4%.

The plaintiff has not sought to prove that the return on such investments is greater than 4%, presumably for the reason that, as appears from the uncontradicted evidence, the return on such investments between 1922 and 1936 varied from 2.4% to 4.36% in the case of United States Government Bonds, and from 3.25% to 5.12% in the case of high-grade corporate bonds (Deft. Ex. A-36, R. 82). Instead, plaintiff relies on testimony that no banking institution would have made a loan for the full amount of the cost of reproducing the fleet, and that the money could have been secured, if at all, only from private parties who would have

charged not less than 6.138%, plus a substantial discount, together with an interest in the operations of the vessels (R. 76–79). But the contention that plaintiff should recover the difference between this cost of money and 4% is contrary to well-settled principles of law, even treating the contract as an agreement to loan plaintiff money at 4% in order to pay for the fleet, the assumption most favorable to the plaintiff. Where a contract to borrow money is entered into to secure money to perform another contract or execute some other undertaking within the contemplation of the parties, the damages for breach of the agreement to loan money may be measured by the excess cost of negotiating another loan where such cost is actually incurred or, if such a loan cannot be or is not negotiated, by the benefit which would have inured from the contract or undertaking for the execution of which the loan agreement was made.[25] Plaintiff can recover nothing, however, for the loss of the contract to buy the vessels by means of the "loan", since it suffered no damage by reason of its inability to make the purchase. And it cannot recover the difference in the interest rates because it did not bor-

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[25] Williston on *Contracts* (Rev. ed. 1937), sec. 1411; Sedgwick on *Damages*, *supra*, sec. 622; *Gooden* v. *Moses*, 99 Ala. 230, 13 So. 765; *New York Life Ins. Co.* v. *Pope*, 24 Ky. L. Rep. 485, 68 S. W. 851; *Shurtleff* v. *Occidental Bldg. & Loan Ass'n*, 105 Neb. 557, 181 N. W. 374; *Bohemian-American W. G. Ass'n* v. *Northern Bank*, 120 N. Y. S. 134 (App. Term).

row the money and therefore did not incur the loss.[26]

In short, the 4% interest element in the contract is relevant only if it be shown that the present value of $3,590,000 is greater than the value of the same sum invested at 4%. This the plaintiff cannot, and, indeed, has not sought to establish.

C. THE ITEMS OF DAMAGE CLAIMED BY PLAINTIFF FOR BREACH OF THE SUPPLEMENTAL CONTRACT WERE NOT PROPERLY ALLOWABLE.

The plaintiff also claims that the court below improperly excluded from consideration two items of damage claimed for breach of the supplemental contract dealing with the unloading apparatus, i. e. the rental value of the unloading apparatus and the expenses incurred by the plaintiff in providing watchmen to care for this apparatus after the date of this Court's decision in the prior litigation sustaining the Government's right to terminate the lease. In its opinion, the court below stated that its award constituted just compensation for the vessels "and unloading apparatus" and "all othe claims" (R. 55), but the court made no finding as to the amount, if any, allowed with respect to the apparatus or for the expense of providing watchmen. It is the Government's position that nothing should have been allowed on account of either item.

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[26] *Bohemian-American W. G. Ass'n* v. *Northern Bank*, 120 N. Y. S. 134 (App. Term).

1. *The court below was not required to consider the rental value of the unloading apparatus.*—During the period of operations under the lease, the plaintiff's right to use the apparatus was without any value because of the restrictions in the lease previously discussed. The stipulation, it is true, recites that the apparatus had an annual rental value of $25,000 from the time of the seizure of the vessels to the present date (R. 67), but the stipulation, we think it will be agreed, was based on the assumption that the apparatus could be used in connection with operation of the fleet free of the restrictions imposed by the lease.

Nor is the rental value material on the question of the damages caused by breach of the agreement to sell the unloading facilities to the plaintiff. The supplemental agreement permitted the plaintiff to buy the apparatus on the terms and conditions governing the purchase of the fleet (R. 22, 31). The facilities were constructed in 1921 or sometime thereafter (Fdg. 50, R. 45–46) at a cost of $210,000, and the plaintiff has neither claimed nor offered any evidence to show that the market value of the apparatus at the time of the seizure of the vessels, taking its rental value, reproduction cost, or any other element, into consideration, was in excess of its cost. On any construction of the contract, therefore, the plaintiff failed to prove that the property was of greater value than the purchase price.

Moreover, by letter of February 13, 1930, the plaintiff offered to waive all claims for the use of the plaintiff's land and the expense of watchmen, if the United States or the Inland Waterways Corporation would convey to plaintiff the unloading facilities and deliver possession of the property on which it was located. To this offer the Acting Secretary of War replied that the United States claimed no right, title, or interest in the unloading apparatus or the land on which it was located, and that it waived whatever right it might be thought to have. The plaintiff apparently treated this letter as acceptance of his offer, for he forwarded it to the Chief of Engineers (one of the parties to the supplemental contract) with the request that the Chief of Engineers state whether he concurred in the Acting Secretary's reply. The Chief of Engineers answered in the affirmative (Fdg. 52, R. 46–47), and, so far as appears, all claims under the supplemental agreement, save those expressly excepted, were understood by the parties to be abandoned. In the court below, the plaintiff contended that the Government officers had no authority to abandon the property. It is evident from the plaintiff's petition, however, which treats the use and occupation of his land by the United States as ending in August 1930 (R. 12), that the plaintiff exercised dominion of ownership over the property after receipt of the Chief of Engineers' reply, and he cannot now challenge the validity of the admin-

istrative decision under which he has enjoyed the benefits of ownership. Indeed, if the Government is to be regarded as the owner, the plaintiff is liable for conversion, since under the supplemental agreement the apparatus did not become part of the realty (R. 22).

2. *The plaintiff's claim for the expense of maintaining watchmen for the unloading apparatus is specious.*—The claim is apparently limited to the amount paid for this purpose since the decision of this Court in *Goltra* v. *Weeks,* on June 7, 1926 (R. 68). And after that date, certainly, the plaintiff was under no obligation whatever to provide watchmen. The letter of Colonel Ashburn of July 18, 1923 (R. 75), might provide a basis for a claim for expenses incurred in caring for the vessels pending disposal of that litigation by this Court, but the letter made it plain that the plaintiff was not requested or expected to incure any such expense thereafter.

D. THE AWARD OF THE COURT OF CLAIMS WAS MORE THAN ADEQUATE

It thus appears that the plaintiff was entitled to recover nothing in excess of its expenditures and that in making its "jury award" (R. 55), the court below allowed the plaintiff $163,865.71 in excess of any legal damages resulting from the seizure. It seems clear that this sum represents the court's estimate of the "value for the lease,

option to purchase" the fleet (*cf.* Fdg. 56, R. 49) and the unloading apparatus (*cf.* R. 55). Presumably the court concluded that various provisions of the principal and supplemental contract, the freedom from any obligation to pay a fixed rental during the period of the lease, and the reasonable interest on the unpaid balance of the purchase price substantially reduced the plaintiff's risk in this hazardous adventure and should be considered in the award, even though on strict principle the plaintiff's damage in addition to his actual expenditures was only nominal. Certainly there is nothing to contradict the court's statement in its findings (Fdg. 56, R. 49) and its opinion (R. 55) that it considered the value of the agreements in the award, and a breakdown of the award clearly shows that a substantial sum was in fact awarded on this account. It is true that the court did not make an express finding as to the separate value of the agreements but, as we have shown, there was no competent or relevant evidence offered by plaintiff on this issue and the court could only make an estimate on the basis of the general character of the agreements themselves. Its award, as we have shown, was in fact too generous, but certainly the plaintiff cannot object on that account.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment below should be reversed

to the extent that it includes an allowance for interest and that, as thus modified, the judgment should be affirmed.

Respectfully submitted.

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DECEMBER 1940.

APPENDIX

Act of April 18, 1934, c. 150, 48 Stat. 1322:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That jurisdiction is hereby conferred upon the Court of Claims of the United States, whose duty it shall be, notwithstanding the lapse of time or the bar of any statute of limitations or previous court decisions, to hear, consider, and render judgment on the claims of Edward F. Goltra against the United States for just compensation to him for certain vessels and unloading apparatus taken, whether tortiously or not, on March 25, 1923, by the United States under orders of the Acting Secretary of War, for the use and benefit of the United States; and any other legal or equitable claims arising out of the transactions in connection therewith: *Provided,* That separate suits may be brought with respect to the vessels and the unloading apparatus, but no suit shall be brought after the expiration of one year from the effective date of this Act: *Provided further,* That either party may appeal as of right to the Supreme Court of the United States from any judgment in said case at any time within ninety days after the rendition thereof, and any judgment rendered in favor of the claimant shall be paid in the same manner as other judgments of said Court of Claims are paid.

Section 177, Judicial Code, as amended (28 U. S. C. § 284):

> (a) No interest shall be allowed on any claim up to the time of the rendition of judgment by the Court of Claims, unless upon a contract expressly stipulating for the payment of interest, except as provided in subdivision (b). [Subdivision (b) relates to tax cases exclusively.]

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 191

THE UNITED STATES,

Appellant,

vs.

KATE B. GOLTRA AND E. FIELD GOLTRA, JR., EXECUTORS OF THE ESTATE OF EDWARD F. GOLTRA, DECEASED.

APPEAL FROM THE COURT OF CLAIMS.

APPELLEES' STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM.

HERMAN J. GALLOWAY,
FREDERICK W. P. LORENZEN,
Counsel for Appellees.

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INDEX.

Subject Index.

	Page
Statement opposing jurisdiction and motion to dismiss or affirm	1
The question as to jurisdiction	1
The question raised by the appeal is unsubstantial and the judgment should be affirmed	2
A. Under the special jurisdictional act the court was required to include a sum measured by interest	6
B. The court having found a taking for the use and benefit of the United States, just compensation including interest must be awarded the plaintiff irrespective of the jurisdictional act	9
Conclusion	12

Table of Cases Cited.

The "Abbotsford", 98 U. S. 440	7
Assiniboine Indian Tribe v. *United States*, 292 U. S. 606	2
Atlantic Refining Co. v. *United States*, 59 C. Cls. 108	7
Barrett Co. v. *United States*, 273 U. S. 227	6
Boston Sand Co. v. *United States*, 278 U. S. 41	8
Brooks-Scanlon Corp. v. *United States*, 265 U. S. 106	6, 11
Cherokee Nation v. *United States*, 270 U. S. 476	8
Colgate v. *United States*, 280 U. S. 43	2
DeLaval Steam Turbine Co. v. *United States*, 70 C. Cls. 51	6
District of Columbia v. *Johnson*, 165 U. S. 330	8
Duckett & Co. v. *United States*, 274 U. S. 765	6
Grays Harbor Motorship Corp. v. *United States*, 71 C. Cls. 167	7
Grymes v. *United States*, 58 C. Cls. 398	7
Hecht v. *Malley*, 265 U. S. 144	7

Page

Jacobs v. *United States*, 290 U. S. 13 ..... 6, 11
Kepner v. *United States*, 195 U. S. 100 7
Liggett & Myers v. *United States*, 274 U. S. 215 ..... 6, 11
Mattern v. *United States*, 66 C. Cls. 559 7
McCool v. *Smith*, 1 Black 459 7
Moore v. *United States*, 60 C. Cls. 326 7
Nitro Powder Co. v. *United States*, 71 C. Cls. 369 7
Ocean S. S. Co. v. *Savannah* v. *United States*, 64 C. Cls. 98 7
Phelps v. *United States*, 274 U. S. 341 ..... 6, 11
Poe v. *Seaborn*, 272 U. S. 101 7
Seaboard Airline Ry. v. *United States*, 261 U. S. 299 ..... 6, 11
Sewing Machine Companies, 18 Wall. 553 7
Smith v. *United States*, 67 C. Cls. 182 7
Squaw Island Freight Terminal Co. v. *United States*, 89 C. Cls. 269 8
Shoshone Tribe v. *United States*, 299 U. S. 476 9
United States v. *Benedict*, 261 U. S. 294 6
United States v. *Merriam*, 263 U. S. 179 7
United States v. *Mooney*, 116 U. S. 104 7
United States v. *North Carolina*, 136 U. S. 211 8
Veneziano v. *United States*, 64 C. Cls. 11 7
Virginia Engineering Co. v. *United States*, 89 C. Cls. 457 ..... 7, 8
Waite v. *United States*, 282 U. S. 508 ..... 6, 10
Wheeling Steel Corp. v. *United States*, 71 C. Cls. 571 7
Yorkview Finance Corp. v. *United States*, 60 C. Cls. 646 7

STATUTE CITED.

Act of July 1, 1918, 40 Stat. 704 11
Private Act No. 69, approved April 18, 1934, 48 Stat. 1322 1

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 191

THE UNITED STATES,

Appellant,

vs.

KATE B. GOLTRA AND E. FIELD GOLTRA, JR., EXECUTORS OF THE ESTATE OF EDWARD F. GOLTRA, DECEASED.

APPELLEES' STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM.

First: The Question as to Jurisdiction.

The judgment from which the appellant appeals was rendered under a special jurisdictional Act which is as follows (Private Act No. 69, approved April 18, 1934, 48 Stat. 1322):

> "*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That jurisdiction is hereby conferred upon the Court of Claims of the United States, whose duty it shall be, notwithstanding the lapse of time or the bar of any statute of limitations or previous court decisions, to hear, consider, and render judgment on the claims

of Edward F. Goltra against the United States for just compensation to him for certain vessels and unloading apparatus taken, whether tortiously or not, on March 25, 1923, by the United States under orders of the Acting Secretary of War, for the use and benefit of the United States; and any other legal or equitable claims arising out of the transactions in connection therewith; *Provided*, That separate suits may be brought with respect to vessels and the unloading apparatus, but no suit shall be brought after the expiration of one year from the effective date of this Act: *Provided further*, That either party may appeal as of right to the Supreme Court of the United States from any judgment in said case at any time within ninety days after the rendition thereof, and any judgment rendered in favor of the claimant shall be paid in the same manner as other judgments of said Court of Claims are paid."

Appellees submit for consideration of the Court the question of whether the language of this Act is sufficient to permit an appeal as distinguished from the right to petition for a writ of certiorari. In this connection appellees call the Court's attention to its decisions in *Colgate* v. *United States*, 280 U. S. 43, and *Assiniboine Indian Tribe* v. *United States*, 292 U. S. 606. In the light of the language used in the special Act herein and in the light of its legislative history set out on pages 3-4 of the appellant's statement as to jurisdiction, appellees believe that it was the intention of Congress to permit an appeal as distinguished from providing merely for the right to petition for a writ of certiorari. For this reason appellees confine themselves to submitting the jurisdictional question to the Court without taking a position thereon.

Second: The Question Raised by the Appeal is Unsubstantial and the Judgment Should be Affirmed.

Appellant does not appeal from the decision in appellees' favor on the merits. The appeal is addressed solely to the

question of whether the Court of Claims erred in holding that there should be included in the judgment "interest at six percent per annum, not as interest but as a part of just compensation". (Opinion, R. 55).

In order to understand the nature of the judgment made, it is necessary briefly to consider the facts found by the Court of Claims and accepted by the defendant on this appeal.

On May 28, 1919, Goltra and the United States, acting through the Chief of Engineers, entered into a contract, referred to in this case as the original contract, and on May 26, 1921, the same parties entered into a supplemental contract (Finding 6). These contracts, which are respectively Exhibits B and C to the petition (Finding 6), gave Goltra the right to possess a fleet of nineteen steel barges and four steel towboats to be operated on the Mississippi River and its tributaries (Exhibit B of petition). Under the contract Goltra was to have possession as lessee for a term of five years after the delivery of the fleet (*id.*). The only rental payable was to consist of the net earnings of the fleet and these net earnings were to be credited to the purchase price of the fleet if Goltra exercised an option conferred upon him to purchase the fleet at an appraised value (*id.*). Under this option provision the balance of the purchase price was payable in fifteen equal annual installments, (*id.*). Goltra in fact twice exercised his option but appellant refused to perform the option provision (Findings 10 and 42). Goltra thus in addition to having a lessee's property rights in the fleet had the other property rights conferred upon him by the option provisions.

Before the fleet was completed and delivered to Goltra, the appellant established a large line of its own on the Mississippi River (Finding 8). The existence of this competing barge line led to difficulties between Goltra and the Secre-

tary of War under whose jurisdiction the competing line was operated (Findings 9, 11, 12, 13 and 14).

The original contract was subject to cancellation if in the judgment of the Chief of Engineers, who was designated the lessor, Goltra had not performed his obligations thereunder (Exhibit B of petition; Opinion, R. 50).

Within a few months after the fleet had been delivered to Goltra (Findings 15 and 23), the Secretary of War, not the Chief of Engineers, purported to cancel Goltra's contract and he demanded a return of the fleet by delivery to Colonel Ashburn, Chief of the competing Government barge line (Finding 23). Goltra refused to comply with the Secretary of War's demand (Finding 25). Thereafter, on March 22, 1923, Colonel Ashburn was authorized by the Acting Secretary of War to take possession of the Goltra fleet (Finding 27).

The manner in which Colonel Ashburn carried out this mandate is described by the Court of Claims as follows (Finding 28):

> "On Sunday, March 25, 1923, while plaintiff was in New York, Ashburn, and several men under his command, acting under orders of the Acting Secretary of War, went to the several places where seventeen of the barges and the four towboats lay moored in the possession of plaintiff's employees and took them from the possession of said employees without the consent of plaintiff or his employees for the use and benefit of the United States."

The Goltra fleet remained in the custody of appellant until September, 1924 (Finding 37). Under a temporary restraining order issued September 4, 1924, possession of the fleet was temporarily returned to Goltra (Finding 39) but after further court action the injunction was dissolved

(Finding 40). Thereafter "defendant (appellant) has retained possession of the boats and barges * * * and has caused the same to be operated as a part of the Mississippi Warrior Service," (Finding 40).

The court found that Goltra had performed all his obligations under the contracts (Findings 32, 33, 34, 35; Opinion, R. 51). Furthermore, the Chief of Engineers, to whose judgment the contracts had entrusted the determination of whether Goltra had or had not performed his contracts, at no time formed a judgment that Goltra had not performed his obligations thereunder (Findings 31, 38; Opinion, R. 53).

Goltra expended very subtantial sums in connection with the original and supplemental contracts, including sums for improving the fleet, certain real estate used in connection therewith and repairing damage done to the fleet by appellant (Findings 43, 44, 45, 46, 47, 48, 50, 51). For these expenditures Goltra was never reimbursed and appellant benefited thereby when it took the property (*id.*; and Finding 33).

It follows that when the appellant took possession of Goltra's fleet for the use and benefit of the United States, the right to possession and other contract rights in relation to the fleet which were valuable property rights and belonged to Goltra were taken from him.

For this taking of Goltra's fleet and other property rights, including certain rights under the supplemental contract, the special jurisdictional Act provides that the Court of Claims shall hear, consider and render judgment on Goltra's claims for just compensation. Under the circumstances thus disclosed, it is abundantly clear that the Court of Claims properly included as part of the recovery a sum measured by interest on the principal amount awarded.

A. Under the Special Jurisdictional Act the Court Was Required to Include a Sum Measured by Interest.

The special Act provides that judgment shall be rendered for just compensation for the taking of Goltra's fleet and other claims arising out of that taking. Since the decision by this Court in *Seaboard Airline Ry.* v. *United States,* 261 U. S. 299, a sum measured by interest has uniformly been made a part of all judgments wherever the statutory measure of recovery is just compensation. This Court has not made any distinction between those cases indicative strictly of the exercise of the power of eminent domain and other cases involving a somewhat different basis for recovery.

A sum measured by interest has been made a part of an award for just compensation prescribed in Acts of Congress for land taken under such Acts, *Seaboard Air Line Ry.* v. *United States,* 261 U. S. 299, 304; *United States* v. *Benedict,* 261 U. S. 294; for leases taken under such Acts, *Phelps* v. *United States,* 274 U. S. 341; see also *Duckett & Co.* v. *United States,* 274 U. S. 765, reversing 62 C. Cls. 781, judgment for interest entered 64 C. Cls. 700; for products and supplies ordered under such Acts, *Liggett & Myers* v. *United States,* 274 U. S. 215; for the taking of contract rights under such Acts, *Brooks-Scanlon Corp.* v. *United States,* 265 U. S. 106; and for the cancellation or suspension of contracts under such Acts, *DeLaval Steam Turbine Co.* v. *United States,* 70 C. Cls. 51, affirmed 284 U. S. 61; *Barrett Co.* v. *United States,* 273 U. S. 227, judgment for interest entered 66 C. Cls. 293. This Court has more recently reviewed the principles established by the foregoing decisions in *Jacobs* v. *United States,* 290 U. S. 13. In *Waite* v. *United States,* 282 U. S. 508, this Court held that an Act of Congress granting to the owner of a patent "reasonable and entire compensation" where the United States had used a patent without the owner's permission

should be construed in the same manner as Acts awarding just compensation and a sum measured by interest was accordingly held to be a proper part of the recovery.

The Court of Claims likewise in an unbroken series of decisions has held a sum measured by interest to be a part of the recovery where Congress has indicated that just compensation should be the measure of recovery.[1]

When Congress passed the special jurisdictional Act herein it knew the meaning of the phrase "just compensation" as it had been interpreted in innumerable decisions of this Court and of the Court of Claims. Indeed Congress had appropriated millions of dollars to pay awards including sums measured by interest under provisions of statutes which required the award of just compensation. In these circumstances the presumption arises that Congress used the words "just compensation" in the full legal significance given them by repeated judicial interpretation. *McCool* v. *Smith*, 1 Black 459, 469; *Case of the Sewing Machine Companies*, 18 Wall. 553, 584; *The "Abbotsford"*, 98 U. S. 440, 444; *United States* v. *Mooney*, 116 U. S. 104, 106; *Kepner* v. *United States*, 195 U. S. 100, 124; *United States* v. *Merriam*, 263 U. S. 179, 187; *Hecht* v. *Malley*, 265 U. S. 144, 153; *Poe* v. *Seaborn*, 272 U. S. 101, 116.

The contention in appellant's jurisdictional statement that interest cannot be permitted against the United States unless expressly authorized by contract or by Congress

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[1] *Benjamin C. Grymes* v. *United States*, 58 C. Cls. 398; *Minnie Moore, Administratrix* v. *United States*, 60 C. Cls. 326; *Yorkview Finance Corp.* v. *United States*, 60 C. Cls. 646; *F. C. Mattern & F. L. Carre, Execs.* v. *United States*, 66 C. Cls. 559; *Atlantic Refining Co.* v. *United States*, 59 C. Cls. 108; *Consorzio Veneziano* v. *United States*, 64 C. Cls. 11; *Ocean S. S. Co. of Savannah* v. *United States*, 64 C. Cls. 98, certiorari denied 277 U. S. 584; *John Russell Smith* v. *United States*, 67 C. Cls. 182; *Grays Harbor Motorship Corp.* v. *United States*, 71 C. Cls. 167; *Nitro Powder Co.* v. *United States*, 71 C. Cls. 369, 374; *Wheeling Steel Corp.* v. *United States*, 71 C. Cls. 571; *Virginia Engineering Co.* v. *United States*, 89 C. Cls. 457.

is of no aid to appellant's case. As appellees have shown, the present jurisdictional Act by using the phrase "just compensation" expressly authorizes the award of a sum measured by interest. In none of the appellant's cases[2] was an Act of Congress involved which required the rendition of judgment for just compensation.

There is no merit in defendant's contention that there is a conflict in the decisions of the Court of Claims relative to the question of permitting interest. The jurisdictional Acts in the present case and in *Virginia Engineering Company* v. *United States*, 89 C. Cls. 457, provided for judgments for just compensation. On the other hand in *Squaw Island Freight Terminal Co.* v. *United States*, 89 C. Cls. 269, the jurisdictional Act authorized the court to render judgment "for just compensation to it for loss of property and/or damages occasioned by the breaking of an inadequate and/or improperly and insufficiently constructed Government dike" (p. 277 footnote). The court in its opinion denied interest because the recovery awarded was not for just compensation but under the alternative clause for damages. In denying interest the court said:

> "* * * but it is clear that it cannot recover interest on the damages sustained by reason of the failure of the defendant to maintain an adequate and properly constructed dike to protect plaintiffs' property from damage or to exercise reasonable diligence in repairing the same after the break on December 18, 1921, and before the damage sustained by plaintiff occurred. * * *"

---

[2] *Boston Sand Co.* v. *United States*, 278 U. S. 41 (the direction was to enter judgment "for the amount of the legal damages sustained"); *Cherokee Nation* v. *United States*, 270 U. S. 476 (holding that no more interest was due on Indian claims than had previously been allowed); *District of Columbia* v. *Johnson*, 165 U. S. 330 (holding that an obligation did not become due until the passage of an Act affording a theretofore non-existent remedy); *United States* v. *North Carolina*, 136 U. S. 211 (holding that a State was not liable to pay interest on bonded indebtedness after the date when the principal was payable).

B. THE COURT HAVING FOUND A TAKING FOR THE USE AND BENEFIT OF THE UNITED STATES, JUST COMPENSATION INCLUDING INTEREST MUST BE AWARDED THE PLAINTIFF IRRESPECTIVE OF THE JURISDICTIONAL ACT.

The Court of Claims has found that Colonel Ashburn pursuant to orders of the Acting Secretary of War seized Goltra's fleet without the consent of Goltra or his employees "for the use and benefit of the United States" (Findings 27 and 28; Opinion R. 52) and that appellant has retained possession of the fleet and caused it to be operated as part of its barge line (Finding 40).

These findings, to none of which defendant has excepted or assigned error, establish the taking of private property for public use. Just compensation under the Fifth Amendment is therefore payable to appellees.

To avoid this conclusion, appellant urges that the taking here was tortious and that therefore a different rule should apply. We know of no case which establishes such rule. In a sense any taking of private property for public use is tortious. Such taking constitutes a trespass. The Fifth Amendment and various Congressional Acts have afforded remedies for such taking of private property. It is true that ordinarily the United States cannot be sued for torious acts by its officers. Where however relief for such acts has been afforded and where such acts amount to taking of private property for the public use, the ordinary measure of just compensation should be applied.

This Court has decided the precise point in *Shoshone Tribe* v. *United States*, 299 U. S. 476. That case involved the claim of the Shoshone Indians for compensation for land wrongfully taken from them by officers of the United States and given to another tribe of Indians. The jurisdictional act was not phrased in terms of just compensation and no specific provisions for interest was made. Defend-

ant as in the present case contended that the original taking had been tortious and that accordingly no sum measured by interest should be allowed. This Court reversing the Court of Claims held that interest constituted an inherent part of the recovery. Mr. Justice Cardozo speaking for the Court said:

> "The claimant's damages include such additional amount beyond the value of its property rights when taken by the Government as may be necessary to the award of just compensation, the increment to be measured either by interest on the value or by such other standard as may be suitable in the light of all the circumstances.
>
> "The fact is unimportant that the taking was tortious in its origin, if it was made lawful by relation. *Crozier* v. *Krupp, supra.* The fact also is unimportant that it was a partial taking only, and that eviction was not complete. *Jacobs* v. *United States,* 290 U. S. 13, 16; *United States* v. *Cress,* 243 U. S. 316, 327-330; *Hurley* v. *Kincaid,* 285 U. S. 95, 104. Finally the fact is unimportant, there having been an appropriation of property within the meaning of the Fifth Amendment, that the jurisdictional act is silent as to an award of interest or any substitute therefor. *United States* v. *Creek Nation, supra,* pp. 110, 111. Cf. *Yankton Sioux Tribe* v. *United States,* 272 U. S. 351, 359. Given such a taking, the right to interest or a fair equivalent, attaches itself automatically to the right to an award of damages. *Jacobs* v. *United States, supra; Phelps* v. *United States,* 274 U. S. 341; *Brooks-Scanlon Corp.* v. *United States,* 265 U. S. 106, 123; *Seaboard Air Line Co.* v. *United States,* 261 U. S. 299, 306. These cases distinguish *United States* v. *North American Co.,* 253 U. S. 330, cited by the Government which 'rested upon its special facts.' * * *"

Close analogy is also furnished by the case of *Waite* v. *United States,* 282 U. S. 508. That suit was brought under

the Act of July 1, 1918, 40 Stat. 704, 705. The Act in so far as here material provides:

> "That whenever an invention described in and covered by a patent of the United States shall hereafter be used or manufactured by or for the United States without license of the owner thereof or lawful right to use or manufacture the same, such owner's remedy shall be by suit against the United States in the Court of Claims for the recovery of his reasonable and entire compensation for such use and manufacture."

This Act did not make legal the unauthorized use of a patent by the United States but simply provided a remedy. The unauthorized use of a patent constituted tortious conduct. Nonetheless this Court held that interest should be allowed as part of the "entire compensation" by analogy to the cases decided under statutes in which Congress had provided for just compensation (*Seaboard Air Line Ry. Co.* v. *United States*, 261 U. S. 299; *Brooks-Scanlon Corp.* v. *United States*, 265 U. S. 106; *Liggett & Myers Tobacco Co.* v. *United States*, 274 U. S. 215; *Phelps* v. *United States*, 274 U. S. 341).

Similarly in the present case Congress has passed an Act entitling the appellees to recover for the taking of property and has recognized the applicability of the provisions of the Fifth Amendment by specifying recovery on the basis of claims for just compensation.

Certainly the taking of appellees' property here for the benefit of the defendant is no different in principle from the taking of plaintiffs' property in *Jacobs* v. *United States*, 290 U. S. 13. The flowing of plaintiffs' land was a common law trespass and would have been regarded as such in a litigation between private parties. Nonetheless this Court had no difficulty in permitting interest because the flowing constituted a taking of private property for public use.

The cases lay down no other test for awarding just compensation including a sum measured by interest than an affirmative answer to the question whether the action is based upon a taking of private property for public use. The findings and opinion of the Court of Claims herein have answered that question in plaintiffs' favor.

Conclusion.

Appellees respectfully move this Court to dismiss this appeal or to affirm the judgment below on motion.

Respectfully submitted,

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Attorneys for Appellees.

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Supreme Court of the United States

OCTOBER TERM, 1940

No. 191

UNITED STATES OF AMERICA,
Petitioner,

v.

KATE B. GOLTRA AND E. FIELD GOLTRA, JR., EXECUTORS OF THE ESTATE OF EDWARD F. GOLTRA, DECEASED,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR RESPONDENTS IN OPPOSITION

RICHARD E. DWIGHT,
HERMAN J. GALLOWAY,
FREDERICK W. P. LORENZEN,
Counsel for Respondents.

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TABLE OF CONTENTS

	PAGE
Opinion Below	1
Jurisdiction	1
The Question	2
Statement	3
ARGUMENT:	
I. Sufficient reasons have not been presented by the petitioner for granting the writ	6
A. Under the special jurisdictional Act the Court of Claims was required to include a sum measured by interest	8
B. The court having found a taking of property for the use and benefit of the United States, just compensation including interest must be awarded the Respondents irrespective of the jurisdictional Act	10
CONCLUSION	14

TABLE OF CASES CITED

The "Abbotsford", 98 U. S. 440	9
Atlantic Refining Co. v. *United States*, 59 C. Cls. 108	9
Barrett Co. v. *United States*, 273 U. S. 227	8
Boston Sand Co. v. *United States*, 278 U. S. 41	10
Brooks-Scanlon Corp. v. *United States*, 265 U. S. 106	8, 14
Cherokee Nation v. *United States*, 270 U. S. 476	10
Consorzio Veneziano v. *United States*, 64 C. Cls. 11	9
Crozier v. *Krupp*, 224 U. S. 290	13

PAGE

DeLaval Steam Turbine Co. v. *United States*, 70 C. Cls. 51, aff'd 284 U. S. 61 8
Del Vecchio v. *Bowers*, 296 U. S. 280 6
District of Columbia v. *Johnson*, 165 U. S. 330 10
Duckett & Co. v. *United States*, 274 U. S. 765 8

Grays Harbor Motorship Corp. v. *United States*, 71 C. Cls. 167 9
Grymes v. *United States*, 58 C. Cls. 398 9

Hecht v. *Malley*, 265 U. S. 144 9
Hijo v. *United States*, 194 U. S. 315 11
Hooe v. *United States*, 218 U. S. 322 11

Jacobs v. *United States*, 290 U. S. 13 ..... 9, 11, 14

Kepner v. *United States*, 195 U. S. 100 9

Liggett & Myers v. *United States*, 274 U. S. 215 ..... 8, 14

Mattern v. *United States*, 66 C. Cls. 559 9
McCool v. *Smith*, 1 Black 459 9
Moore v. *United States*, 60 C. Cls. 326 9

Nitro Powder Co. v. *United States*, 71 C. Cls. 369 9

Ocean S. S. Co. of Savannah v. *United States*, 64 C. Cls. 98 9

Phelps v. *United States*, 274 U. S. 341 ..... 8, 14
Poe v. *Seaborn*, 282 U. S. 101 9

Seaboard Airline Ry. v. *United States*, 261 U. S. 299 ..... 8, 14
Sewing Machine Companies, 18 Wall. 553 9
Smith v. *United States*, 67 C. Cls. 182 9
Squaw Island Freight Terminal Co. v. *United States*, 89 C. Cls. 269 7
Shoshone Tribe v. *United States*, 299 U. S. 476 11

Tilson v. *United States*, 100 U. S. 43 10

United States v. *Benedict*, 261 U. S. 294 8
United States v. *Buffalo Pitts Co.*, 234 U. S. 228 11

PAGE

United States v. *Merriam*, 263 U. S. 179 9
United States v. *Mooney*, 116 U. S. 104 9
United States v. *North Carolina*, 136 U. S. 211 10
United States v. *Verdier*, 164 U. S. 213 10
Virginia Engineering Co. v. *United States*, 89 C. Cls. 457 ..... 7, 9
Waite v. *United States*, 282 U. S. 508 13
Wheeling Steel Corp. v. *United States*, 71 C. Cls. 571 9
Yearsley v. *Ross Construction Co.*, 309 U. S. 18 ..... 11, 13
Yorkview Finance Corp. v. *United States*, 60 C. Cls. 646 9

STATUTES CITED

Act of July 1, 1918, 40 Stat. 704 13
Private Act. No. 69, approved April 18, 1934, 48 Stat. 1322 2

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Opinion Below

The opinion of the Court of Claims is not yet officially reported.

Jurisdiction

The judgment of the Court of Claims was entered April 1, 1940. The jurisdiction of this Court is invoked

under Section 3(b) of the Act of February 13, 1925, as amended.

The Question

The writ of certiorari is sought to review only the question of whether the Court of Claims properly included in the judgment "interest at six per cent per annum, . . . not as interest but as a part of just compensation" (R. 49, 55). No review is sought as to the decision on the merits in favor of respondents.

The special jurisdictional act upon which the court's judgment was based is, in so far as here material, as follows (48 Stat. 1322, C. 150):

> *"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That jurisdiction is hereby conferred upon the Court of Claims of the United States, whose duty it shall be, notwithstanding the lapse of time or the bar of any statute of limitations or previous court decisions, to hear, consider and render judgment on the claims of Edward F. Goltra against the United States for just compensation to him for certain vessels and unloading apparatus taken, whether tortiously or not, on March 25, 1923, by the United States under orders of the Acting Secretary of War, for the use and benefit of the United States; and any other legal or equitable claims arising out of the transactions in connection therewith . . ."

Respondents contend that no writ of certiorari should be granted because no substantial question of general interest is involved and no other grounds for granting the writ

are presented. Furthermore, the decision of the Court of Claims is in accordance with all the applicable precedents and is correct, not only under the terms of the special jurisdictional act, but on the basis of the facts found, which indicate a taking of private property for public use.

Statement

In order to understand the propriety of the judgment of the Court of Claims in awarding just compensation including a sum measured by interest, it is necessary to set out a somewhat fuller statement of facts than is found in the petition.

On May 28, 1919, Goltra, the original plaintiff herein, and the United States, acting through the Chief of Engineers, entered into a contract, referred to in this case as the original contract, and on May 26, 1921, the same parties entered into a supplemental contract (Finding 6, R. 31). These contracts (R. 15-23), gave Goltra, as lessee, the right to possess, for a term of five years from date of delivery, a fleet of nineteen steel barges and four steel towboats to be operated on the Mississippi River and its tributaries (*id.*). The only rental payable was to consist of the net earnings of the fleet and these net earnings were to be credited to the purchase price of the fleet if Goltra exercised an option conferred upon him in the contract to purchase the fleet at an appraised value (*id.*). Under this option provision the balance of the purchase price was payable in fifteen equal annual installments (*id.*). Goltra in fact twice exercised his option but petitioner refused to perform the option provision (Findings 10 and 42, R. 32, 44).

Before the fleet was completed and delivered to Goltra, the United States established a barge line of its own on the

Mississippi River (Finding 8, R. 31). The existence of this competing barge line led to difficulties between Goltra and the Secretary of War under whose jurisdiction the competing line was operated (Findings 9, 11, 12, 13 and 14, R. 32-34).

The original contract was subject to cancellation if in the judgment of the Chief of Engineers, who was designated the lessor, Goltra had not performed his obligations thereunder (Exhibit B of petition, R. 15, 19-20; Opinion, R. 50).

Within a few months after the fleet had been delivered to Goltra (Findings 15 and 23, R. 34, 39), the Secretary of War, not the Chief of Engineers, purported to cancel Goltra's contract and he demanded a return of the fleet by delivery to Colonel Ashburn, Chief of the competing Government barge line (Finding 23, R. 39). Goltra refused to comply with the Secretary of War's demand (Finding 25, R. 40). Thereafter, on March 22, 1923, Colonel Ashburn was authorized by the Acting Secretary of War to take possession of the Goltra fleet (Finding 27, R. 41).

The manner in which Colonel Ashburn carried out this mandate is described by the Court of Claims as follows (Finding 28, R. 41):

> "On Sunday, March 25, 1923, while plaintiff was in New York, Ashburn, and several men under his command, acting under orders of the Acting Secretary of War, went to the several places where seventeen of the barges and the four towboats lay moored in the possession of plaintiff's employees and took them from the possession of said employees without the consent of plaintiff or his employees for the use and benefit of the United States." *

*See also Opinion, R. 52.

The Goltra fleet remained in the custody of the United States until September, 1924 (Finding 37, R. 43). Under a temporary restraining order issued September 4, 1924, possession of the fleet was temporarily returned to Goltra (Finding 39, R. 44) but after further court action the injunction was dissolved (Finding 40, R. 44). Since that time "defendant [petitioner] has retained possession of the boats and barges . . . and has caused the same to be operated as a part of the Mississippi Warrior Service [the government line]" (Finding 40, R. 44).

The court found that Goltra had performed all his obligations under the contracts (Findings 32, 33, 34, 35, R. 42; Opinion, R. 51). Furthermore, the Chief of Engineers, to whom had been entrusted the determination of whether Goltra had or had not performed his contracts, at no time formed a judgment that Goltra had not performed his obligations thereunder (Findings 31, 38, R. 41, 43-44; Opinion, R. 53).

Goltra had surrendered claims against the United States as consideration for the original contract (R. 15-16), the value of which was lost by the seizure of the fleet. Goltra also expended very substantial sums in connection with the original and supplemental contracts, including sums for improving the fleet, certain real estate used in connection therewith and repairing damage done to the fleet by petitioner (Findings 43, 44, 45, 46, 47, 48, 50, 51, R. 45-46). For these expenditures Goltra was never reimbursed and the United States benefited thereby when it took the property (*id.*; and Finding 33, R. 42).

It follows that when Goltra's fleet was taken for the use and benefit of the United States (Finding 28, R. 41), the right to possession and other valuable contract and

property rights belonging to Goltra were taken from him. For this taking of Goltra's fleet and other property rights, including certain rights under the supplemental contract, the special jurisdiction Act provides that the Court of Claims shall "hear, consider and render judgment on the claims of Edward F. Goltra against the United States for just compensation to him." Under the circumstances thus disclosed, it is abundantly clear that the Court of Claims properly included as part of the recovery a sum measured by interest on the principal amount awarded.

ARGUMENT

I.

SUFFICIENT REASONS HAVE NOT BEEN PRESENTED BY THE PETITIONER FOR GRANTING THE WRIT.

The United States prays for review only of the question whether, under the special jurisdictional act, interest, not as interest but as a part of just compensation, should have been awarded by the Court of Claims. The question is limited to the construction of one private act of Congress, applicable in no other situation. Under subdivision (5) of Rule 38 of this Court, the United States has presented no case calling for the exercise of this Court's discretion to grant the writ. The interpretation of a special jurisdictional act applicable to no other case does not call for the exercise of this Court's discretion to permit review. Cf. *Del Vecchio* v. *Bowers*, 296 U. S. 280, 285.

Although petitioner argues (Petition, pp. 7-8) that there is a conflict in the decisions of the Court of Claims relative to the award of interest in cases where recovery

provided in special jurisdictional acts is just compensation, in fact no such conflict exists. The Court of Claims, as respondents will show below, has uniformly permitted interest in cases where the statute requires an award of just compensation.

The special jurisdictional Acts in the present case and in *Virginia Engineering Co.* v. *United States,* 89 C. Cls. 457, both provide for judgments for just compensation. A sum measured by interest as part of the recovery was allowed by the Court of Claims in both cases. On the other hand, in *Squaw Island Freight Terminal Co.* v. *United States,* 89 C. Cls. 269, the special jurisdictional Act authorized the court to render judgment "for just compensation to it for loss of property and/or damages occasioned by the breaking of an inadequate and/or improperly and insufficiently constructed Government dike" (p. 277 footnote). The court denied interest because the recovery awarded was not for just compensation but under the alternative clause for damages. In denying interest, the court said (p. 278):

> ". . . but it is clear that it cannot recover interest on the damages sustained by reason of the failure of the defendant to maintain an adequate and properly constructed dike to protect plaintiffs' property from damage or to exercise reasonable diligence in repairing the same after the break on December 18, 1921, and before the damage sustained by plaintiff occurred. . . ."

The different wording of the special jurisdictional Acts compelled different judicial results. There is, however, no conflict in the decisions. No general rule can be laid down to govern special Acts which are essentially unlike.

Finally, no reason for review has been presented because the decision of the Court of Claims is correct and fully in accord with the precedents in this Court and in the Court of Claims.

A. Under the special jurisdictional Act the Court of Claims was required to include a sum measured by interest.

The special Act provides that judgment shall be rendered for just compensation for the taking of Goltra's fleet and other claims arising out of that taking. Since the decision by this Court in *Seaboard Airline Ry.* v. *United States*, 261 U. S. 299, a sum measured by interest has uniformly been made a part of all judgments wherever the statutory measure of recovery is just compensation. This Court has not made any distinction between these cases indicative strictly of the exercise of the power of eminent domain and other cases involving a somewhat different basis for recovery.

A sum measured by interest has been made a part of an award for just compensation prescribed in Acts of Congress for land taken under such Acts: *Seaboard Air Line Ry.* v. *United States*, 261 U. S. 299, 304; *United States* v. *Benedict*, 261 U. S. 294; for leases taken under such Acts, *Phelps* v. *United States*, 274 U. S. 341; see also *Duckett & Co.* v. *United States*, 274 U. S. 765, reversing 62 C. Cls. 781, judgment for interest entered 64 C. Cls. 700; for products and supplies ordered under such Acts, *Liggett & Myers* v. *United States*, 274 U. S. 215; for the taking of contract rights under such Acts, *Brooks-Scanlon Corp.* v. *United States*, 265 U. S. 106; and for the cancellation or suspension of contracts under such Acts, *DeLaval Steam Turbine Co.* v. *United States*, 70 C. Cls. 51, aff'd 284 U. S. 61; *Barrett Co.* v. *United States*, 273 U. S. 227, judgment

for interest entered 66 C. Cls. 293. This Court has more recently reviewed the principles established by the foregoing decisions in *Jacobs* v. *United States*, 290 U. S. 13.

The Court of Claims likewise in an unbroken series of decisions has held a sum measured by interest to be a part of the recovery where Congress has indicated that just compensation should be the measure of recovery.*

When Congress passed the special jurisdictional Act herein it knew the meaning of the phrase "just compensation" as it had been interpreted in innumerable decisions of this Court and of the Court of Claims. Indeed, Congress had appropriated millions of dollars to pay awards including sums measured by interest under provisions of statutes which require the award of just compensation. In these circumstances the presumption arises that Congress used the words "just compensation" advisedly and in the full legal significance given them by repeated judicial interpretation. *McCool* v. *Smith*, 1 Black 459, 469; *Case of the Sewing Machine Companies*, 18 Wall. 553, 584; *The "Abbotsford"*, 98 U. S. 440, 444; *United States* v. *Mooney*, 116 U. S. 104, 106; *Kepner* v. *United States*, 195 U. S. 100, 124; *United States* v. *Merriam*, 263 U. S. 179, 187; *Hecht* v. *Malley*, 265 U. S. 144, 153; *Poe* v. *Seaborn*, 282 U. S. 101, 116.

**Benjamin C. Grymes* v. *United States*, 58 C. Cls. 398; *Minnie Moore, Administratrix* v. *United States*, 60 C. Cls. 326; *Yorkview Finance Corp.* v. *United States*, 60 C. Cls. 646; *F. C. Mattern & F. L. Carre, Execs.* v. *United States*, 66 C. Cls 559; *Atlantic Refining Co.* v. *United States*, 59 C. Cls. 108; *Consorzio Veneziano* v. *United States*, 64 C. Cls. 11; *Ocean S. S. Co. of Savannah* v. *United States*, 64 C. Cls. 98, certiorari denied 277 U. S. 584; *John Russell Smith* v. *United States*, 67 C. Cls. 182; *Grays Harbor Motorship Corp.* v. *United States*, 71 C. Cls. 167; *Nitro Powder Co.* v. *United States*, 71 C. Cls. 369, 374; *Wheeling Steel Corp.* v. *United States*, 71 C. Cls. 571; *Virginia Engineering Co.* v. *United States*, 89 C. Cls. 457.

Petitioner's contention that interest cannot be permitted against the United States unless expressly authorized by contract or by Congress is of no aid to petitioner's case. The present jurisdictional Act by using the phrase "just compensation" expressly authorizes the award of a sum measured by interest. In none of the cases cited by petitioner* was an act of Congress involved which required the rendition of judgment for just compensation.

B. The court having found a taking of property for the use and benefit of the United States, just compensation including interest must be awarded the Respondents irrespective of the jurisdictional Act.

The Court of Claims has found that Colonel Ashburn, pursuant to orders of the Acting Secretary of War, seized Goltra's fleet without the consent of Goltra or his employees "for the use and benefit of the United States" (Findings 27 and 28, R. 41; Opinion, R. 52) and that petitioner has retained possession of the fleet and caused it to be operated as part of its barge line (Finding 40, R. 44).

**Boston Sand Co.* v. *United States,* 278 U. S. 41 (the direction was to enter judgment "for the amount of the legal damages sustained"); *Cherokee Nation* v. *United States,* 270 U. S. 476 (holding that no more interest was due on Indian claims than had previously been allowed); *District of Columbia* v. *Johnson,* 165 U. S. 330 (holding that an obligation did not become due until the passage of an Act affording a theretofore non-existent remedy); *United States* v. *Verdier,* 164 U. S. 213 (no interest allowed on claim by postmaster for adjusted salary); *United States* v. *North Carolina,* 136 U. S. 211 (holding that a State was not liable to pay interest on a bonded indebtedness after the date when the principal was payable); *Tilson* v. *United States,* 100 U. S. 43, 46 (no interest allowed where the Act merely authorized the court to decide the "amount equitably due . . . for such loss or damage").

These findings, to none of which petitioner has excepted or assigned error, establish the taking of private property for public use. Just compensation under the Fifth Amendment is therefore payable to respondents.

To avoid this conclusion, petitioner urges that the taking here was tortious and that therefore a different rule should apply. This contention lacks merit. In a sense any taking of private property for public use is tortious. Such taking constitutes a trespass. The Fifth Amendment and various Congressional Acts have afforded remedies for such taking of private property. It is true that ordinarily the United States cannot be sued for tortious acts by its officers.* Where, however, relief for such acts has been afforded and where such acts amount to taking of private property for the public use, the ordinary measure of just compensation should be applied. In such a situation the tortious Act has been adopted by the United States and it must respond by making the usual payment of just compensation.

This Court has decided the precise point in *Shoshone Tribe* v. *United States*, 299 U. S. 476. That case involved the claim of the Shoshone Indians for compensation for land wrongfully taken from them by officers of the United States and given to another tribe of Indians. The special jurisdictional Act was not phrased in terms of just com-

*The language cited by petitioner from *Hooe* v. *United States*, 218 U. S. 322, 335, 336; *Jacobs* v. *United States*, 290 U. S. 13, 18; *Hijo* v. *United States*, 194 U. S. 315, 323; *United States* v. *Buffalo Pitts Co.*, 234 U. S. 228, 233-235; *Yearsley* v. *Ross Construction Co.*, 309 U. S. 18, 20-22, does not go beyond this proposition. There is nothing in these cases which prevents the recovery of just compensation where the tortious act in question was adopted by the United States, was for the benefit of the United States and Congress granted a remedy.

pensation and no specific provisions for interest were made. The United States, as in the present case, contended that the original taking had ben tortious and that, accordingly, no sum measured by interest should be allowed. This Court reversing the Court of Claims held that interest constituted an inherent part of the recovery. Mr. Justice Cardozo, speaking for the Court, said (pp. 496-497):

> "The claimant's damages include such additional amount beyond the value of its property rights when taken by the Government as may be necessary to the award of just compensation, the increment to be measured either by interest on the value or by such other standard as may be suitable in the light of all the circumstances.
>
> "The fact is unimportant that the taking was tortious in its origin, if it was made lawful by relation. *Crozier* v. *Krupp, supra.* The fact also is unimportant that it was a partial taking only, and that eviction was not complete. *Jacobs* v. *United States,* 290 U. S. 13, 16; *United States* v. *Cress,* 243 U. S. 316, 327-330; *Hurley* v. *Kincaid,* 285 U. S. 95, 104. Finally, the fact is unimportant, there having been an appropriation of property within the meaning of the Fifth Amendment, that the jurisdictional act is silent as to an award of interest or any substitute therefor. *United States* v. *Creek Nation, supra,* pages 110, 111. *Cf. Yankton Sioux Tribe* v. *United States,* 272 U. S. 351, 359. Given such a taking, the right to interest or a fair equivalent, attaches itself automatically to the right to an award of damages. *Jacobs* v. *United States, supra; Phelps* v. *United States,* 274 U. S. 341; *Brooks-Scanlon Corp.* v. *United States,* 265 U. S. 106, 123; *Seaboard Air Line Co.* v. *United States,* 261 U. S. 299, 306. These cases distinguish *United States* v. *North American Co.,* 253 U. S.

330, cited by the Government which 'rested upon its special facts.' . . ."

More recently this Court, in *Yearsley* v. *Ross Construction Co.*, 309 U. S. 18, a case cited by the petitioner, has reaffirmed the principle thus enunciated by quoting the following from *Crozier* v. *Krupp*, 224 U. S. 290, 305 (309 U. S., at p. 22):

> "' 'The adoption by the United States of the wrongful act of an officer is of course an adoption of the act when and as committed, and causes such act of the officer to be, in virtue of the statute, a rightful appropriation by the Government, for which compensation is provided.' "

Close analogy is also furnished by the case of *Waite* v. *United States*, 282 U. S. 508. That suit was brought under the Act of July 1, 1918, 40 Stat. 704, 705. The Act, in so far as here material, provides:

> "That whenever an invention described in and covered by a patent of the United States shall hereafter be used or manufactured by or for the United States without license of the owner thereof or lawful right to use or manufacture the same, such owner's remedy shall be by suit against the United States in the Court of Claims for the recovery of his reasonable and entire compensation for such use and manufacture."

This statute did not make legal the unauthorized use of a patent by the United States but simply provided a remedy. The unauthorized use of a patent constituted tortious conduct. None the less, this Court held that interest should be allowed as part of the "entire compensation" by analogy

to the cases decided under statutes in which Congress had provided for just compensation (*Seaboard Air Line Ry. Co.* v. *United States,* 261 U. S. 299; *Brooks-Scanlon Corp.* v. *United States,* 265 U. S. 106; *Liggett & Myers Tobacco Co.* v. *United States,* 274 U. S. 215; *Phelps* v. *United States,* 274 U. S. 341).

Similarly, in the present case, Congress has passed an Act entitling the respondents to recover for the taking of property and has recognized the applicability of the provisions of the Fifth Amendment by specifying recovery on the basis of claims for just compensation.

Certainly the taking of respondents' property here for the benefit of the United States is no different in principle from the taking of plaintiffs' property in *Jacobs* v. *United States,* 290 U. S. 13. The flowing of plaintiffs' land was a common law trespass and would have been regarded as such in a litigation between private parties. None the less this Court had no difficulty in permitting interest because the flowing constituted a taking of private property for public use.

The findings and opinion of the Court of Claims in our case establish a taking of private property for public use. Under these circumstances the decisions compel the award of just compensation including a sum measured by interest.

CONCLUSION

This petition for writ of certiorari should be denied.

Respectfully submitted,

RICHARD E. DWIGHT,
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IN THE

Supreme Court of the United States

OCTOBER TERM 1940

No. 191

THE UNITED STATES,
Appellant,
against
KATE B. GOLTRA and E. FIELD GOLTRA, JR.,
Executors of the Estate of Edward F. Goltra, deceased,
Appellees.

No. 192

KATE B. GOLTRA and E. FIELD GOLTRA, JR.,
Executors of the Estate of Edward F. Goltra, deceased,
Cross-Appellants,
against
THE UNITED STATES,
Cross-Appellee.

ON APPEAL AND CROSS APPEAL FROM THE UNITED STATES COURT OF CLAIMS

BRIEF OF APPELLEES—CROSS-APPELLANTS

RICHARD E. DWIGHT,
HERMAN J. GALLOWAY,
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Cross-Appellants

December 3, 1940

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TABLE OF CONTENTS

	PAGE
Opinion of the Court Below	1
Jurisdiction of this Court	2
The Special Jurisdictional Act	2
The Issues on the Appeals	3
Statement of the Case	4-15
A. On the Merits	4-11
B. As to the Amount of Recovery	11-15
Argument	15
FIRST: The Court of Claims erred in failing to consider as part of just compensation certain elements of value including particularly the rental or productive value of the fleet	15-28
SECOND: The offer of Standard Oil Company of Louisiana to rent the Goltra fleet for a term of five years was admitted in evidence without objection, is conceded to be true and should have been considered by the Court of Claims in determining the productive value of the fleet	28-35
THIRD: The Court of Claims properly awarded a sum measured by interest as part of just compensation	35-56
A. The award of a sum measured by interest as part of just compensation is required by the Fifth Amendment and directed by the special jurisdictional act	35-51
B. The special jurisdictional act alone compels the award of a sum measured by interest as part of just compensation	51-56
Conclusion	56
Appendix A	i-xii
Appendix B	xiii-xiv
Appendix C	xv-xvi
Appendix D	xvii-xviii
Appendix E	xix-xx
Appendix F	xxi-xxii

TABLE OF CASES

PAGE

Atlantic Refining Co. v. *United States,* 59 C.Cls. 108. 37

Barrett Co v. *United States,* 273 U. S. 227, judgment for interest entered 66 C. Cls. 293..... 37
Boston Sand Co. v. *United States,* 278 U. S. 41.....55, 56
Brooks-Scanlon Corp. v. *United States,* 265 U. S. 106 .....18, 22, 33, 37, 48
Buena Vista Land & Development Co. v. *Lucas,* 9 Cir., 41 F. (2d) 131.....31, 32

Camden Iron Works v. *The United States,* 47 C. Cls. 124 34
Case of the Sewing Machine Companies, 18 Wall. 553 38
Cherokee Nation v. *United States,* 270 U. S. 476.... 56
City of Chicago v. *Lehmann,* 262 Ill. 468..... 32
Clarke v. *Hot Springs Electric Light & Power Co.,* 10 Cir., 55 F. (2d) 612.....29, 31
Consorzio Veneziano v. *United States,* 64 C. Cls. 11 37
Crozier v. *Krupp,* 224 U. S. 290.....47, 48, 49

DeLaval Steam Turbine Co. v. *United States,* 70 C. Cls. 51, aff'd 284 U. S. 61..... 37
Diaz v. *United States,* 223 U. S. 442..... 34
Dowling v *Jones,* 2 Cir., 67 F. (2d) 537..... 34
Duckett, A. W., & Co., Inc. v. *United States,* 274 U. S. 765, rev'g 62 C. Cls. 781, judgment for interest entered 64 C. Cls. 700..... 37

Faust v. *Hosford,* 119 Iowa 97..... 32
Filor v. *United States,* 9 Wall. 45..... 40

Gatling v. *Newell,* 9 Ind. 572..... 32
Georgia, Florida & Alabama Railway Co. v. *Spivey,* 14 Ga. App. 157..... 32

PAGE

German-Am. etc. Bank v. *Spokane etc. Nav. Co.*, 49 Wash. 359 32
Gibbons v *United States*, 8 Wall. 269..... 40
Gol.:a v. *Weeks*, 271 U. S. 536....10, Appendix A iv, viii
Grays Harbor Motorship Corp. v. *United States*, 71 C. Cls. 167.....37, 53
Grymes, Benjamin C. v. *United States*, 58 C. Cls. 398 37
Gulf Refining Co. v. *United States*, 58 C. Cls. 559... 23

Hecht v. *Malley*, 265 U. S. 144..... 38
Heiner v. *Crosby*, 3 Cir., 24 F. (2d) 191.....31, 32
Hetzel v. *Baltimore & Ohio Railroad Co.*, 169 U. S. 26 52
Hijo v. *United States*, 194 U. S. 315..... 41
Hill v. *United States*, 149 U. S. 593.....41, 42
Hooe v. *United States*, 218 U. S. 322.....39, 40, 43
Hudson Navigation Co. v. *United States*, 57 C. Cls. 411 23
Hurley v. *Kincaid*, 285 U. S. 95.....42, 43

Jackson v. *Innes*, 231 Mass. 558..... 22
Jacobs v *United States*, 290 U. S. 13..... 37

Kepner v. *United States*, 195 U. S. 100..... 38
Klebe v. *United States*, 263 U. S. 188.....41, 42

Langford v. *United States*, 101 U. S. 341.....41, 42
Liggett & Myers v. *United States*, 274 U. S. 215...37, 49
Lynch v. *United States*, 6 C. Cls. 246..... 34

Maclay, J. P., et al. v. *United States*, 43 C. Cls. 90... 22
Manufacturers Paper Co. v. *Commissioner of Int. Rev.*, 2 Cir., 89 F. (2d) 684.....31, 32
Mattern, F. C. & F. L. Carre, Execs. v. *United States*, 66 C. Cls. 559..... 37
McCool v. *Smith*, 1 Black 459..... 38
McIntyre v. *United States*, 52 C. Cls. 503..... 34
Moore, Administratrix, Minnie v. *United States*, 60 C. Cls. 326 37

PAGE

Monongahela Navigat'n Co. v. *United States*, 148 U. S. 312 ..... 20, 21, 22

Nantasket Beach Steamboat Co. v. *United States*, (D. C. Mass.), 297 Fed. 656 56
Nitro Powder Co. v. *United States*, 71 C. Cls. 369 ..37, 53
North American Telegraph Co. v. *Northern Pac. Ry. Co.*, 8 Cir., 254 Fed. 417 32

Ocean S. S. Co. of Savannah v. *United States*, 64 C. Cls. 98 certiorari den'd 277 U. S. 584 37
Olson v. *United States*, 292 U. S. 246 ..... 19, 33

Pearson v. *United States*, 267 U. S. 423 41
Pennell v. *United States* (D. C. Maine), 162 Fed. 75 .. 56
Phelps v. *United States*, 274 U. S. 341 ..... 37, 49
Poe v. *Seaborn*, 282 U. S. 101 38

Republican Newspaper Co. v. *Northwestern Associated Press*, 8 Cir., 51 Fed. 377 ..... 31, 32
Rottlesberger v. *Hanley*, 155 Iowa 638 32
Rowland v. *St. Louis & S. F. R. R. Co.*, 244 U. S. 106 34
Russian Fleet v. *United States*, 282 U. S. 481 19

Schlemmer v. *Buffalo, Rochester, &c. Ry.*, 205 U. S. 1 . 34
Seaboard Air Line Ry. v. *United States*, 261 U. S. 299 ..... 19, 36, 37, 48, 50, 55
Sharp v. *United States*, 191 U. S. 341 ..... 29, 30, 31
Shoshone Tribe v. *United States*, 299 U. S. 476 . .45, 46, 49
Sommers v. *Commissioner of Internal Revenue*, 10 Cir., 63 F. (2d) 551 ..... 29, 31
Spiller v. *Atchison, T. & S. F. Ry. Co.*, 253 U. S. 117. 34
Squaw Island Freight Term. Co. v. *United States*, 89 C. Cls. 269 54
Smith, John Russell v. *United States*, 67 C. Cls. 182 .. 37

Tempel v. *United States*, 248 U. S. 121 ..... 41, 42
The "Abbotsford," 98 U. S. 440 38
The Ames & Carroll No. 20, 2 Cir., 66 F. (2d) 413 .. 22

PAGE

The Cygnus, Roscoe, Damages in Marine Collisions, 3rd ed. 154 (not officially reported) 32
The Lagonda (E. D. N. Y.), 44 Fed. 367 22
The Missouri River Packet Co. v. *Hannibal & St. Joseph R. R. Co.*, 79 Mo. 478 22
The Waalhaven (S. D. N. Y.), 1 F. Supp. 396, aff'd 64 F. (2d) 25 cert. den'd, 289 U. S. 752 31
Tillson v. *United States*, 100 U. S. 43 56

United States v. *Benedict*, 261 U. S. 294 37
United States v. *Commonwealth Line*, 278 U. S. 427 .. 56
United States v. *Creek Nation*, 295 U. S. 103 ...44, 45, 49
United States v. *Cress*, 243 U. S. 316 42
United States v. *Great Falls Mfg. Co.*, 112 U. S. 645. 42
United States v. *Lynah*, 188 U. S. 445 42
United States v. *Merriam*, 263 U. S. 179 38
United States v. *Mooney*, 116 U. S. 104 38
United States v. *New River Collieries*, 262 U. S. 341 .. 19
United States v. *The Thekla*, 266 U. S. 328 39

Virginia Engineering Co., Inc. v. *United States*, 89 C. Cls. 457 .....37, 54

Waite v. *United States*, 282 U. S. 508 .....48, 49
Wheeling Steel Corp. v. *United States*, 71 C. Cls. 571 .....37, 53
Williamson et al. v. *Barrett et al.*, 13 How. 101 22

Yearsley v. *Ross Constr. Co.*, 309 U. S. 18 .....43, 48
Yorkview Finance Corp. v. *United States*, 60 C. Cls. 646 37

TABLE OF TEXTS AND LAW REVIEW ARTICLES

	PAGE
27 Columbia Law Review 98	23
39 Harvard Law Review 760	23
Roscoe, Damages in Marine Collisions, 3rd ed.	32

TABLE OF MISCELLANEOUS AUTHORITIES

Act of July 1, 1918, 40 Stat., c. 114, p. 705	48
Act of June 25, 1910, 36 Stat., c. 423, p. 851	47
Court of Claims Act (Judicial Code §145, 28 U. S. C. A. §250)	39
Emergency Shiping Act of June 15, 1917	18
House Report No. 1426, Seventy-second Congress, first session	11, Appendix A vi
House Report No. 828, Seventy-third Congress, second session	11, 50, 52, Appendix A i
Lever Act, 40 Stat., c. 53, §10, pp. 276, 279	36, 55
Rules of the Court of Claims, Rule 44	34
Senate Report No. 362, Seventy-third Congress, second session	11, 50, 52, Appendix A xi
Special Jurisdictional Act, 48 Stat., c. 150, p. 1322	2, 15
Tucker Act (Judicial Code §24, 28 U. S. C. A. §41(20)	39, 40, 43

IN THE

Supreme Court of the United States

OCTOBER TERM 1940

No. 191

THE UNITED STATES,

Appellant,

against

KATE B. GOLTRA and E. FIELD GOLTRA, JR., Executors of the Estate of Edward F. Goltra, deceased,

Appellees.

No. 192

KATE B. GOLTRA and E. FIELD GOLTRA, JR., Executors of the Estate of Edward F. Goltra, deceased,

Cross-Appellants,

against

THE UNITED STATES,

Cross-Appellee.

ON APPEAL AND CROSS APPEAL FROM THE UNITED STATES COURT OF CLAIMS

BRIEF OF APPELLEES—CROSS-APPELLANTS

OPINION OF THE COURT BELOW

The decision and opinion of the Court of Claims appear at R. 29-56 and are not yet officially reported.

JURISDICTION OF THIS COURT

This case is here on appeal and cross-appeal pursuant to the terms of the special jurisdictional act providing (R. 14-15) "That either party may appeal as of right to the Supreme Court of the United States from any judgment in said case at any time within ninety days after the rendition thereof . . . ." The final judgment of the Court of Claims is dated April 1, 1940 (R. 29, 56). The cross-appelants' petition (R. 58), assignment of errors (R. 59), order allowing cross-appeal (R. 62) and request for record (R. 63) were filed in this court on or before June 25, 1940 (R. 58, 59, 62, 63). Probable jurisdiction was noted on October 14, 1940. Out of an abundance of caution, both parties also filed petitions for writs of certiorari. As there is an appeal and cross-appeal, the appellees cross-appellants who were plaintiffs below will be designated simply as plaintiffs and the appellant cross-appellee will be referred to as the United States.

THE SPECIAL JURISDICTIONAL ACT

The special jurisdictional act under which the Court of Claims acted is as follows (48 Stat., c. 150, p. 1322) (R. 29-30):

"AN ACT

Conferring jurisdiction upon the Court of Claims of the United States to hear, consider, and render judgment on the claims of Edward F. Goltra against the United States arising out of the taking of certain vessels and unloading apparatus.

Be it enacted by the Senate and House of Representatives of the United States of America in

Congress assembled, that jurisdiction is hereby conferred upon the Court of Claims of the United States, whose duty it shall be, notwithstanding the lapse of time or the bar of any statute of limitations or previous court decisions, to hear, consider, and render judgment on the claims of Edward F. Goltra against the United States for just compensation to him for certain vessels and unloading apparatus taken, whether tortiously or not, on March 25, 1923, by the United States under orders of the Acting Secretary of War, for the use and benefit of the United States; and any other legal or equitable claims arising out of the transactions in connection therewith: Provided, That separate suits may be brought with respect to the vessels and the unloading apparatus, but no suit shall be brought after the expiration of one year from the effective date of this Act: Provided further, That either party may appeal as of right to the Supreme Court of the United States from any judgment in said case at any time within ninety days after the rendition thereof, and any judgment rendered in favor of the claimant shall be paid in the same manner as other judgments of said Court of Claims are paid."

THE ISSUES ON THE APPEALS

Neither party appeals from the judgment of the Court of Claims in plaintiffs' favor on the merits. The United States appeals (R. 57) from that part of the judgment which awards a sum measured by interest, described by the court as an award "not as interest but as a part of just compensation" (R. 49, 55). Plaintiffs contend that the taking of Goltra's property for public use required the award of just compensation, including a sum measured by interest, under the decisions interpretive of the Fifth Amendment

and by reason of the direction in the Special Jurisdictional Act to pay just compensation. The plaintiffs base their cross-appeal (R. 59-62) on the ground that the principal sum awarded as part of just compensation is inadequate, particularly because the court below (1) failed to take into consideration the rental or productive value of the property taken as well as other relevant factors such as the cost value and expected life of the fleet, and (2) refused to consider an offer made to rent the property, although this offer was fully proved by testimony of the offeror as well as offeree, without objection on the part of the United States when the evidence was introduced (R. 66-68).

STATEMENT OF THE CASE

The Record on these appeals contains, in addition to the findings and opinion of the court (R. 29-56) a stipulation as to certain facts, signed by the Solicitor General, in lieu of the extensive record made before the Commissioner of the Court of Claims. (R. 66-82.)

The facts as found by the Court of Claims on the merits are unchallenged by either party and we review them briefly for an understanding of the contentions as to the nature and amount of recovery.

A. *On the Merits.*

Edward F. Goltra conducted certain experiments in river transportation in cooperation with the United States to assist in solving the acute transportation problems created by the first World War (Finding 3, R. 30). The result of his experiments were reported to the President and enabled the Corps of Engineers of the Army to prepare specifications for a Mississippi River fleet, which Goltra

offered to take over and operate upon completion (Finding 3, R. 30).

Thereafter, as a wartime measure, the United States contracted for the construction of a fleet of nineteen steel barges and four steel towboats (Finding 4, R. 30). The barges were substantial vessels of 300 foot length and 48 foot beam; each was capable of carrying 3,000 tons of solid or liquid cargo (Finding 15, R. 35). The barges were "the most advanced in type of any river barge constructed" (Finding 15, R. 35). Each barge cost $110,000 and that was approximately its value at the time of the Government's seizure, which forms the basis of this controversy (R. 66-67).

Each towboat was of 300 foot length and 58 foot beam and was equipped with an engine rated at approximately 2,000 horsepower (Finding 15, R. 35). The average cost of the towboats was $375,000 each, and that was the approximate value of the boats at the time of the seizure (R. 66-67).

While the fleet was under construction, on May 28, 1919, Goltra and the United States, acting through the Chief of Engineers, entered into a contract, referred to as the original contract (Finding 6, R. 31). On May 26, 1921, the same parties entered into a supplemental contract (Finding 6, R. 31), relating principally to unloading facilities to be used in connection with the operation of the fleet. The contracts (R. 15-23) gave Goltra, as lessee, the right to possess and operate on the Mississippi River and its tributaries, for a term of five years from date of delivery, the fleet of nineteen steel barges and four towboats and the right to possess and operate the unloading facilities (R. 16, 20-23). The only rental payable was to consist of

the net earnings of the fleet. These net earnings were to be credited to the purchase price of the fleet and unloading facilities if Goltra exercised an option conferred upon him in the contracts to purchase the fleet and unloading facilities at an appraised value (R. 17-19, 22). Under this option provision, the balance of the purchase price was payable in fifteen equal annual installments (R. 19).

The contracts were subject to cancellation only if, in the judgment of the Chief of Engineers, who was designated the lessor, Goltra had not performed his obligations thereunder (R. 15, 19-20; Opinion, R. 50).

Before the fleet was completed and delivered to Goltra, the United States established under the Secretary of War a barge line of its own on the Mississippi River (Finding 8, R. 31). The existence of this competing barge line led to difficulties between Goltra and the Secretary of War, under whose jurisdiction the competing line was operated (Findings 9, 11, 12, 13, 14; R. 32-34). The Government line was permitted by the Secretary of War to carry all available freight at 80% of the prevailing rail rates (Finding 8, R. 31-32). Originally Goltra had been given permission to carry freight on the same basis (Finding 9, R. 32), but, as the time for the delivery of the fleet approached in March, April and May, 1922, the Secretary of War rescinded the permission previously given and, after plaintiff protested, permitted the 80% rate to be charged only for freight which the Government line could not carry (Findings 11, 12, 13, 14; R. 33-34). The Secretary of War stated his position to be that he "could not authorize or approve any operation on the lower Mississippi that would enter into competition with the established line of barges" (Finding 11, R. 33).

The fleet was finally delivered to Goltra at St. Louis on July 15, 1922 (Finding 15, R. 34). The towboats at that time had certain defects in mechanism which had to be remedied by Goltra (Finding 16, R. 35). Goltra operated the fleet after its delivery to him, although he was hampered not only by the defects in the towboats but also by the unprecedented low water conditions on the Mississippi and the attitude which the Secretary of War had taken (Finding 17, R. 35-36; Finding 35, R. 42; Opinion, R. 54).

During this period of operation the court stated that Goltra operated the fleet "to the best advantage" and that "There was no complaint or protest by the lessor of the operation of the fleet . . ." (Opinion, R. 51). In December, 1922, with the approval and consent of the United States District Engineer, Goltra placed the fleet in winter quarters, as was customary at that time in St. Louis, in order to avoid the hazards of winter navigation and to prevent damage to the fleet from ice and other winter elements (Finding 18, R. 36-37; Opinion R. 51). At the time when the fleet was thus placed in winter quarters "It was understood that the fleet was to remain in winter quarters until navigation could be safely resumed in the spring of 1923" (Opinion, R. 51).

While the fleet was so disposed, the Secretary of War was apparently casting about for means of taking the fleet from Goltra because, in January, 1923, he sent a memorandum to the Chief of Engineers stating, with reference to the Goltra contract "According to the view of the Judge Advocate General, we cannot annul the contract at this time with impunity", and he requested the District Engineer to include in future reports information necessary to establish

the Government's right to cancel the Goltra contract in the event that any breach of contract could be discovered (Finding 20, R. 37).

Before navigation opened up in the spring of 1923 and while the Goltra fleet was still properly in winter quarters, the Government having taken no steps to order Goltra to remove the fleet from such quarters, the Secretary of War, on March 3, 1923, purported to exercise the discretion vested by Goltra's contract in the Chief of Engineers (Finding 23, R. 39). The Secretary of War transmitted to Colonel Ashburn, who was Chief of the competing Government barge line, written instructions to deliver to Goltra a letter in which the Secretary of War purported to cancel Goltra's contracts and demand the delivery of the fleet and the unloading facilities to Colonel Ashburn (Finding 23, R. 39). Goltra refused to comply with the Secretary of War's demand (Finding 25, R. 40).

Thereafter, and still prior to the time when navigation was resumed on the Mississippi River at St. Louis, the Acting Secretary of War on March 22, 1923 authorized Colonel Ashburn to take possession of the Goltra fleet (Finding 27, R. 41; Finding 32, R. 42). The United States District Engineer at St. Louis, who "did not know of the order of the Acting Secretary of War to Ashburn to seize the barges and towboats",[1] described the action taken by Ashburn as follows in a telegram to the Chief of Engineers (Opinion, R. 52):

> "'Col. Ashburn with the Federal Barge Line towboat Vicksburg and about forty men arrived at Goltra fleet yesterday Sunday morning about eleven overawed Goltra's men and towed four boats and

[1]Finding 30, R. 41.

one barge down river about six miles Stop Vicksburg left them on Illinois side, came back to St. Louis, placed four Goltra barges at Barge Line Terminal and went down river with all other Goltra barges wintered at this city * * *.'"

The Court of Claims in its findings described the seizure of the fleet by Ashburn as follows (Finding 28, R. 41):

> "On Sunday, March 25, 1923, while plaintiff was in New York, Ashburn, and several men under his command, acting under orders of the Acting Secretary of War, went to the several places where seventeen of the barges and the four towboats lay moored in the possession of plaintiff's employees and took them from the possession of said employees without the consent of plaintiff or his employees for the use and benefit of the United States."[1]

Litigation seeking injunctive relief immediately followed the Government's seizure (Finding 36, R. 43). The fleet, however, remained in the custody of the United States until September, 1924 (Finding 37, R. 43). Under a temporary restraining order issued September 4, 1924, possession of the fleet was temporarily returned to Goltra (Finding 39, R. 44), but after further court action the injunction was dissolved (Finding 40, R. 44). Since that time "Defendant [United States] has retained possession of the boats and barges . . . and has caused the same to be operated as a part of the Mississippi Warrior Service [the competing Government line]" (Finding 40, R. 44).

The Court of Claims has found that Goltra, prior to the seizure of the fleet, had performed all his obligations under the contracts (Findings 32, 33, 34, 35, R. 42;

[1] See also Opinion, R. 52.

Opinion, R. 51). Furthermore, the court found that the Chief of Engineers, to whom had been entrusted the determination of whether Goltra had or had not performed his contracts, at no time formed a judgment that Goltra had not performed his obligations hereunder (Finding 31, R. 41; Finding 38, R. 44; Opinion R. 53). Accordingly, the Court of Claims concluded that the seizure of the fleet was improper and that the plaintiffs herein are entitled under the special jurisdictional act to just compensation for the consequences of the Government's actions (R. 49, 53).

Although there is no challenge to the court's decision in plaintiffs' favor on the merits, we point out that the decision of the Court of Claims is wholly consistent in principle with the decision of this Court in the injunction proceeding (*Goltra* v. *Weeks*, 271 U. S. 536). This Court in that decision assumed that the Chief of Engineers had properly exercised his discretion to cancel the Goltra contract. The facts now found and undisputed show that the letter purporting to cancel the contracts, written more than a month after the seizure (Finding 38, R. 43-44), was not written by the Chief of Engineers in the exercise of his own judgment, but that he was "coerced . . . in signing the order cancelling the contract" (Finding 38, R. 44; Opinion, R. 53). The Court of Claims said (R. 53):

> "The evidence is clear and convincing that the Chief of Engineers believed the plaintiff had performed his part of the contract and that there was no cause or reason which would justify him in cancelling the contract."

For further discussion of the former decision by this Court and the reasons prompting the present Jurisdictional Act,

we refer to the Congressional Committee reports (Appendix A, *infra,* pp. i-xii, especially pp. iv-v, viii-x).

Plaintiffs' second cause of action relates to the unloading facilities covered by the Supplemental Contract (R. 21-22). Pursuant to this contract, Goltra had provided a tract of land and concrete runways on the bank of the Mississippi River at St. Louis (Finding 50, R. 45-46), and the Government had erected thereon and leased to Goltra a very substantial traveling crane of ten-ton capacity to be used in connection with loading and unloading the barges (Finding 50, R. 46). After the seizure of the fleet, the unloading crane remained on Goltra's concrete runways and land and remains there to the present time (Finding 52, R. 46-47). It is obviously a useless encumbrance on Goltra's property, and Goltra was deprived of its contemplated use in connection with the operation of the fleet.

B. *As to the Amount of Recovery.*

The court awarded the principal sum of $350,000 to the plaintiffs, together with interest, "not as interest but as a part of just compensation" (R. 49, 55-56). The sum was arrived at after taking into account counterclaims in the sum of approximately $7,600 (Findings 54-56, R. 47-49). Accordingly, the court determined that just compensation, as of the date of the seizure, was approximately $357,600. Of this total the court's findings show that $187,736.99 consisted of sums actually expended in connection with the contracts, including sums for improving the fleet and repairing damage done to the fleet by the Government, the construction of concrete runways required by the Supplemental Contract, as well as other expenses incidental to Goltra's performance of the contract (Find-

ings 43, 44, 45, 46, 47, 48, 50, R. 45-46).[1] For these expenditures Goltra was never reimbursed and the United States benefited thereby when it took the property (Findings just cited, and *cf.* Finding 33, R. 42). Thus only about $170,000 was found to be the injury done to Goltra by the seizure of the fleet, the unloading facilities and the destruction of his contract rights.

The small amount of the recovery allowed, the failure to make findings which had been made by the Commissioner and requested by the plaintiffs, and the court's opinion, all indicate that the court failed to give any effect to elements of value which, under the cases, plaintiffs believe should have been considered in determining the amount of just compensation (R. 59-62, and *cf.* Opinion R. 54). We refer to these briefly here.

The average cost of the towboats concededly was $375,000 each and the average cost of the barges was $110,000 each (R. 66). The approximate cost of the fleet of nineteen barges and four towboats was $3,590,000; that was approximately its value at the time of the seizure (R. 66-67).

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[1]This total is an addition of expenditures embodied in findings as follows:

Finding 43	$ 6,414.28
" 44	1,027.23
	732.11
" 45	7,140.89
" 46	5,038.44
" 47	79,474.52
" 48	30,830.30
	21,017.73
" 50	36,061.49
	$187,736.99

The United States concedes as true the fact that Standard Oil Company of Louisiana offered to rent the Goltra fleet in May, 1925, when Goltra was in possession of the fleet under the temporary restraining order, for a term of five years on substantially a bare boat basis at the rate of 1/15 of 1 per cent. a day on the cost of the towboats, assumed to be $400,000 each, and 1/10 of 1 per cent. per day on the cost of the barges, assumed to be $110,000 each (R. 67). It is conceded that this offer was made in good faith and that the Standard Oil Company was at all times financially able to carry out its obligations under such a lease, had it been made (R. 67). Goltra could not accept the offer because, as a result of the litigation and the acts of the Secretary of War, he was unable to assure the Standard Oil Company of possession of the fleet for the term of the proposed lease (R. 67).

The United States also concedes that at the time of the seizure and within reasonable time thereafter, it would have been impossible to obtain a fleet similar to the Goltra fleet in the open market and that it would have required at least two years from the date of letting the contract to construct such a fleet (R. 67).

As to the rental or productive value of the fleet, in addition to the Standard Oil offer just described, there was evidence introduced by both the plaintiffs and the United States as to the reasonable market rental value of the fleet on the Mississippi River and its tributaries (R. 68-73). Plaintiffs' evidence, including the testimony of five experts and a contemporary writing by Colonel Gotwals of the United States Corps of Engineers, indicated that the reasonable rental value of the fleet on substantially a bare boat basis was 1/15 of 1 per cent. per day of the cost

of each towboat, and 1/10 of 1 per cent. per day of the cost of each barge, less the expense of annual heavy overhaul and repair amounting, on an average, to about $2,000 per year for each towboat and $500 per year for each barge (R. 69-72). That was the rental value found by the Commissioner (R. 59-60). This evidence indicates that the net market rental value of the fleet amounted to a sum slightly in excess of $1,000,000 a year.[1] The expert called by the United States tended to support plaintiffs' basic figures, although he believed that the long term commercial rental rate should be somewhat less (R. 72).

The United States asked for a finding fixing the rental value of the fleet at a sum approximately one-third as high as the sum fixed by plaintiffs' experts (R. 69). To support this figure, the United States relied entirely on the testimony of an assistant in the cost accounting section of the Chief of Engineers' office (R. 72). This witness had no experience with the actual rental of equipment and was not acquainted with actual rates (R. 72).

Plaintiffs and the United States both requested findings as to the normal, remaining useful life of the fleet at the time of the seizure (R. 61; 73), plaintiffs requesting a finding of thirty years and the United States twenty years (R. 73). The Court of Claims made no finding upon this matter.

Plaintiffs also requested a finding as to the interest rate upon which money could have been borrowed in order to finance the reconstruction of a fleet similar to the one seized (R. 61, 74). Plaintiffs' evidence tended to establish that such interest rate during the time material would have

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[1]For calculation of this amount see Appendix B, *infra*, pp. xiii-xiv.

been no less than 6.138 per cent. annually (R. 74), as compared with the 4 per cent. interest payable by Goltra under his contract with the Government (R. 19). The United States asked for an alternative finding dealing with interest rates generally (R. 74). The court below failed to make any finding upon this question.

The court also refused (R. 61) to make findings of fact, most of which the United States concedes to be true, relative to the second cause of action, such as the cost of the unloading facilities, the rental value of these facilities (R. 67-68) and the value of the land furnished by Goltra for the unloading facilities (R. 61, 74).

ARGUMENT

FIRST: THE COURT OF CLAIMS ERRED IN FAILING TO CONSIDER AS PART OF JUST COMPENSATION CERTAIN ELEMENTS OF VALUE INCLUDING PARTICULARLY THE RENTAL OR PRODUCTIVE VALUE OF THE FLEET.

Addressing itself to the seizure of Goltra's fleet "for the use and benefit of the United States", the special jurisdictional act directs the Court of Claims to "render judgment on the claims of Edward F. Goltra against the United States for just compensation to him for certain vessels and unloading apparatus taken, whether tortiously or not . . . by the United States . . . for the use and benefit of the United States; and any other legal or equitable claims arising out of the transactions in connection therewith" (Finding 2, R. 29).

The Court of Claims recognized the necessity of awarding recovery, as directed by this Act, for just compensation.

That court failed, however, to consider, as part of just compensation, elements of recovery which, under the decisions of this court, should have entered into the ultimate award made.

One of the most important elements in determining the amount of compensation recoverable by reason of the seizure, is the rental or productive value of the fleet. The Commissioner of the Court of Claims found the rental value of the fleet in accordance with plaintiffs' request (R. 59-60). Both the plaintiffs and the United States requested the court to make a finding as to rental value (R. 68-69), but the court refused to make any finding whatever on this subject. In its opinion, the court clearly indicated that it did not take into account in awarding just compensation the market rental value of the fleet, for the court said (R. 54):

> "It is contended by the plaintiff that, in arriving at just compensation . . . the rental value of similar vessels on the Mississippi River should be taken into consideration. These contentions cannot be sustained."

This language obviously referred to plaintiffs' contention that market rental value should be considered. The court's theory that rental value was not an element of just compensation is also illustrated by other language following the passages just quoted (see R. 54).

The court below refused to make a finding that a fleet similar to the Goltra fleet could not have been obtained in the open market at the time of the seizure and that it would have taken two years from the date of letting contracts to reproduce such a fleet (R. 60-61). Such a finding was

made by the Commissioner and the truth thereof is unchallenged (R. 60-61; R. 66, 67).

The Court of Claims also refused to make findings as to the original cost and the value of the fleet at the time of the seizure, although the Commissioner had made a finding which is not challenged by either party (R. 59, 66). The court likewise failed to make a finding as to the remaining useful life of the fleet, although a finding on this question was made by the Commissioner and requested by both parties (R. 61, R. 73).

With the seizure of the fleet, Goltra's rights and privileges under the contracts with the United States were also seized or terminated. Under the provisions of the contracts, the net rental realized from the fleet and unloading facilities was to have been credited on the purchase price of the fleet and unloading apparatus (R. 17-19). The balance of the purchase price was payable in fifteen equal annual installments, with interest at the rate of 4 per cent (R. 18-19). This provision permitted Goltra to purchase the fleet under a very favorable financial arrangement. One of the elements of this arrangement was the low interest rate. The Commissioner found that Goltra could not at the time of the seizure of the fleet or within a reasonable time thereafter have borrowed money upon such favorable terms, and that the interest rate for any loan which could have been negotiated would have been at least 2.138 per cent. greater (R. 61). The Court of Claims, although requested by plaintiffs to make such a finding and requested by the United States to make a finding as to interest (R. 74), failed to make any finding on this question.

The necessity of considering these elements to arrive at a proper award is manifest. The cases are in accord

that all elements must be considered in arriving at just compensation.

The most elaborate consideration of this question in recent years is found in *Brooks-Scanlon Corp.* v. *United States*, 265 U. S. 106. There this Court considered the elements which should properly constitute just compensation for the requisitioning of ship contracts under the Emergency Shipping Act of June 15, 1917. The claimant in that case had a contract with the New York Shipbuilding Corporation to construct a ship. Approximately half of the contract price had been paid when the United States, acting through the Emergency Fleet Corporation, requisitioned all ships under construction in the builder's shipyard and the materials on hand for the completion of the hulls. At the time of such requisition, the claimant's ship was about 19 per cent. completed. The Court held that the requisitioning of the hull was also a taking of the claimant's contract. This holding is similar to the plaintiffs' contention here that the seizure of the fleet resulted likewise in the taking of Goltra's contract rights.

In the *Brooks-Scanlon* case, the Court then considered in detail the question of how just compensation should be determined. Clearly, the claimant was not entitled to the value of a completed ship, for claimant's ship was not completed and claimant had not paid more than half the purchase price. This Court defined the amounts recoverable as follows (pp. 123, 125-126):

> "By the taking, the claimant lost and the United States obtained the right to have the completed ship delivered to it on or before February 1, 1918, upon payment of the instalments remaining to be paid under the contract. It is settled by the decisions of

this Court that just compensation is the value of the property taken at the time of the taking."

* * *

"Determination of just compensation is to be based on the fact that claimant's contract and its rights and interest thereunder were expropriated, and that it is entitled to have their value at the time of the taking. The value of such ships at the time of requisition, and the then probable value at the time fixed for delivery, the contract price, the payments made and to be made, the time to elapse before completion and delivery, the possibility that by reason of the Government's action in control of materials, etc., the contractor might not be able to complete the ship at the date fixed for performance, the loss of use of money to be sustained, the amount of other expenditures to be made between the time of requisition and delivery, together with other pertinent facts, are to be taken into account and given proper weight to determine the amount claimant lost by the taking [Citations], that is, the sum which will put it in as good a position pecuniarily as it would have been in if its property had not been taken."

The decisions in this Court are uniform that where the measure of recovery is just compensation the full and perfect equivalent of the property taken must be awarded. *Seaboard Air Line Ry.* v. *United States,* 261 U. S. 299, 304; *United States* v. *New River Collieries,* 262 U. S. 341, 343, 345; *Russian Fleet* v. *United States,* 282 U. S. 481, 489; *Olson* v. *United States,* 292 U. S. 246, 255.

To determine such perfect compensation for the property and property rights which Goltra lost by reason of the seizure there must, within the rules laid down by this Court, be included a consideration of the productive or rental value

of the fleet and the very favorable terms of financing afforded by Goltra's contract with the United States. This proposition finds full support in *Monongahela Navigat'n Co.* v. *United States,* 148 U. S. 312. There Congress, by special statute, authorized the condemnation of claimant's lock and dam as part of the improvement of navigation in the Monongahela River. Claimant had a franchise from the State of Pennsylvania to collect tolls for the use of the locks. The condemnation statute expressly directed the court (p. 313) "that in estimating the sum to be paid by the United States, the franchise of said corporation to collect tolls shall not be considered or estimated . . .". This Court, however, held that compensation must be made for the franchise as well as the lock and dam, because the Fifth Amendment was applicable to the situation and Congress could not limit the recovery payable under the terms of that Amendment. In commenting upon the words "just compensation" in the Amendment, the Court said (p. 326):

> "There can, in view of the combination of those two words, be no doubt that the compensation must be a full and perfect equivalent for the property taken."

This Court, in holding that the taking of the physical property composed of the lock and dam also constituted a taking of the plaintiff's franchise, said (p. 343):

> "But this franchise goes with the property; and the Navigation Company, which owned it, is deprived of it. The government takes it away from the company, whatever use it may make of it; and the question of just compensation is not determined by the value to the government which takes, but the value to the individual from whom the property is

taken; and when by the taking of the tangible property the owner is actually deprived of the franchise to collect tolls, just compensation requires payment, not merely of the value of the tangible property itself, but also of that of the franchise of which he is deprived."

As to the determination of just compensation, this Court said (pp. 328, 329):

"How shall just compensation for this lock and dam be determined? What does the full equivalent therefor demand? The value of property, generally speaking, is determined by its productiveness—the profits which its use brings to the owner. Various elements enter into this matter of value. * * * * Demand for the use is another factor. The commerce on the Monongahela River, as appears from the testimony offered, is great; the demand for the use of this lock and dam constant. A precisely similar property, in a stream where commerce is light, would naturally be of less value, for the demand for the use would be less. The value, therefore, is not determined by the mere cost of construction, but more by what the completed structure brings in the way of earnings to its owner. For each separate use of one's property by others, the owner is entitled to a reasonable compensation; and the number and amount of such uses determine the productiveness and the earnings of the property, and, therefore, largely its value. So that if this property, belonging to the Monongahela Company, is rightfully where it is, the company may justly demand from every one making use of it a compensation; and to take that property from it deprives it of the aggregate amount of such compensation which otherwise it would continue to receive."

* * *

> "So, before this property can be taken away from its owners, the whole value must be paid; and that value depends largely upon the productiveness of the property, the franchise to take tolls."

In both the *Brooks-Scanlon* and *Monongahela Navigation Company* cases, this Court held that the taking of certain tangible property operated as well to deprive the claimants of contract rights. In both cases this Court held that just compensation must be made equally for the taking of the tangible property and for the taking of the contract rights. In the *Brooks-Scanlon* case this Court indicated that the same rules of valuation must be applied to "contract rights and other intangibles" as to "physical things" (265 U. S., at p. 123).

In the *Monongahela Navigation* case it was also definitely decided that in calculating just compensation "productiveness of the property" must be given substantial weight (p. 329). In that case the productiveness of the property was measured largely by the right to take tolls under the claimant's contract with the State.

In the present case, the productive value of the property depends largely upon the use value of the fleet. It has been decided under a variety of circumstances that where the court is called upon to evaluate the use value of vessels, it will do so upon the basis of the rental value thereof, often expressed in terms of charter hire or demurrage. *Williamson et al.* v. *Barrett et al.*, 13 How. 101, 111, 112; *The Lagonda* (E.D.N.Y.), 44 Fed. 367, 369; *The Ames & Carroll No 20*, 2 Cir., 66 F. (2d) 413, 415; *J. P. Maclay, et al.* v. *United States*, 43 C. Cls. 90; *Jackson* v. *Innes*, 231 Mass. 558, 560-561; *The Missouri River Packet Co.* v.

Hannibal & St. Joseph R. R. Co., 79 Mo. 478, 493-494; 39 Harvard L. R. 760; 27 Columbia L.R. 98. Indeed, the Court of Claims in *Gulf Refining Co.* v. *United States*, 58 C.Cls. 559, 577, and *Hudson Navigation Co.* v. *United States*, 57 C.Cls. 411, 415, 416-417, has heretofore recognized that the market rental value or charter hire of ships is a decisive factor to be considered in awarding just compensation.

The peculiar facts of the present case especially require the consideration of the productive or rental value of the fleet in fixing just compensation. Goltra held the fleet at the time of the seizure under a lease. Under this lease he was entitled not only to the right to possess and use the fleet, but this possession and use in turn were to afford him the means for purchasing the fleet and acquiring complete title thereto.

The contract contemplated payment for the fleet out of its earnings and contemplated that the option to purchase would, in the nature of things, be exercised, for there is no provision as to the use to which the rental accumulated under the lease is to be applied except to the purchase price of the fleet (R. 18-19). It was contemplated that Goltra was to have the use of the fleet for the purpose of realizing a net return thereon to be applied to the purchase price of the fleet. Indeed, Goltra twice exercised his option to purchase, but the United States refused either before or after the seizure to perform its obligations in that regard (Finding 10, R. 32; Finding 42, R. 44).

The seizure of the fleet by the United States, therefore, took from Goltra not only the right to possess and use the fleet for the term of the lease, but the right to possess the fleet during its life and to pay the purchase price for the

fleet out of the revenue produced by the fleet. It is thus apparent that one of the principal things taken from Goltra was the productive value of the fleet—in other words, its rental value for the life of the fleet. But this primary item of value the Court of Claims refused entirely to consider.

How serious an error was committed by the Court of Claims is apparent from even a brief consideration of the rental value figures. As the Court of Claims made no finding whatever on rental value, we shall assume, for the purpose of discussing the figures involved, that the findings made by the Commissioner which are supported by the overwhelming weight of evidence (R. 59-60; R. 68-73) would have been made.

The annual net market rental value of the fleet was $1,110,350, or $4,779,067.55 for the unexpired period of the lease.[1] There would thus, under the terms of Goltra's contract, have been deposited within less than four years an amount greater than the purchase price and accrued interest. At the end of five years from the date of the delivery of the fleet, Goltra would have been the owner of the fleet, having at that time a depreciated value of $3,231,000 and a remaining useful life of from 16 to 26 years. The use value of the fleet to Goltra during the period of the lease alone exceeded the cost of the fleet by $747,909.55.[2]

The productive value of the fleet may also be considered in another light in determining the amount of just compensation which should here be awarded. The United

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[1]The calculation appears as the first calculation in Appendix B, *infra*, pp. xiii-xiv.

[2]The precise calculation appears as the second calculation in Appendix B, *infra*, pp. xiii-xiv.

States does not challenge the fact that this fleet was unique, that it could not have been replaced in the open market, and that from the time of the seizure it would have taken somewhat in excess of two years to build another fleet like it (R. 66, 67). Goltra therefore could under no circumstances have replaced the fleet and acquired its potential productivity in less than that time. The rental value of the fleet during this period of time would have been $2,220,700.[1] Furthermore, in order to finance the construction of a new fleet, Goltra would have had to pay interest at least 2.138 per cent. in excess of the 4 per cent. interest rate stipulated in the contract (cf. R. 18 and R. 74).

The value of possession of the fleet under the contract of which Goltra was deprived by the seizure was therefore the cost or reproduction value of the fleet, viz., $3,590,000 (R. 66-67), together with the sum of $2,834,733.59[1] representing the rental value of the fleet during the period of construction and the interest differential—a total of $6,424,733.59. From this total there must, of course, be subtracted the sum of $3,590,000, which Goltra had to pay in any event, either to the United States or for the construction of a new fleet. On this basis the net use value of the fleet, at the time of the seizure, would have amounted to $2,834,733.59.

It is also interesting to reconstruct the operation of Goltra's contract with the United States in its entirety. We shall assume, in other words, that the United States had properly performed its duties under the option provision of the contract, that Goltra had thus acquired the right to permanent possession of the fleet, and that he paid

[1] This sum is calculated in Appendix C, *infra*, pp. xv-xvi.

therefor in fifteen stipulated equal annual installments. We assume, also, that the market rental value of the fleet was received by Goltra. On this basis, at the end of the fifteen year period, the total net return after payments to the United States, together with the depreciated value of the fleet, would have amounted to $13,711,456.05.[1]

We have made these calculations to show that a failure to consider the rental or productive value of the fleet in its relation to Goltra's contract rights constitutes a very serious omission. We do not suggest that any of these calculations constitutes the exact measure of just compensation, but when it is remembered that the court awarded, over and above out of pocket expenditures, a sum of only $170,000 to compensate Goltra for the seizure of the fleet and the consequent loss of his contract rights, it is obvious that a very different result would have been achieved had the productivity of the fleet, measured by its rental value, been taken into consideration. It may not be amiss to point out that Colonel Ashburn, who seized the fleet, advised the plaintiff during the course of the injunction litigation that a reasonable rental for the fleet was "being set aside and held, to be paid, if the Supreme Court decides that your lease is non-recoverable by the Secretary of War" (R. 75). That decision has now been made by the Court of Claims and is unchallenged.

In measuring the productivity of the fleet, we have shown in the calculations made that it is essential also to take into account the original cost of the fleet, which was approximately its value at the time of the seizure (See R.

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[1]The calculations upon which this figure is based appear as Appendix D, *infra*, pp. xvii-xviii.

66-67). The Court of Claims should be required to make the undisputed finding as to this sum. Also, in considering the productivity of the fleet and the value of Goltra's contract rights, we have shown that it is necessary to consider the life expectancy of the fleet, in other words, its rate of depreciation and the differential in interest rates under the contract and in the open money market. Accordingly, the Court of Claims should also be required to make the findings requested on these subjects (See R. 61, 73, 74). And the Court of Claims should be required to consider these matters in awarding just compensation.

The argument which we have made relative to recovery under the first cause of action applies equally to the second cause of action. The seizure of the fleet and the purported cancellation of both the original and supplemental contracts (Finding 23, R. 39) deprived Goltra of the use of the unloading facilities in the same manner in which he was deprived of the use of the fleet. In addition, Goltra was deprived of the use of land and the concrete runways which he had furnished for use in connection with the unloading facilities (Findings 50-53, R. 45-47). The Court of Claims made a finding and stated in its opinion that it considered the rental value of Goltra's land and expenditures made by him in connection with the supplemental contract. The Court, however, refused to find and did not consider the rental value of the unloading equipment (R. 61). This rental value is conceded in the stipulation entered into for the purpose of this appeal, to have been $25,000 a year (R. 66, 67). Nor did the Court consider wages which Goltra was required to pay to watchmen to watch the unloading facilities for the benefit of the United States (R. 66, 68).

Without further argument, it is our contention that the same principles of just compensation heretofore discussed should be applied to the second cause of action. The figures indicating the use value of the facilities and the wages for watchmen which constituted a necessary expenditure are set forth in Appendices E and F, *infra,* pages xix-xxii.

SECOND: THE OFFER OF STANDARD OIL COMPANY OF LOUISIANA TO RENT THE GOLTRA FLEET FOR A TERM OF FIVE YEARS WAS ADMITTED IN EVIDENCE WITHOUT OBJECTION, IS CONCEDED TO BE TRUE AND SHOULD HAVE BEEN CONSIDERED BY THE COURT OF CLAIMS IN DETERMINING THE PRODUCTIVE VALUE OF THE FLEET.

The very substantial market rental value of the Goltra fleet as testified to by plaintiffs' experts was fully substantiated by an actual offer to rent the Goltra fleet for a period of five years upon the very terms specified in the expert testimony (*cf.* R. 66, 67 and R. 68-72). The United States concedes that this offer was in fact made in good faith by an offeror amply able to perform the obligations of such a charter party (R. 66, 67). It is thus conceded that in May, 1925, Standard Oil Company of Louisiana desired to acquire the use of barges and towboats for the transportation of oil on the Mississippi River, and for that purpose offered to lease the Goltra fleet on substantially a bare boat basis, the lessee to pay all operating expenses, insurance, maintenance, repairs "and all other costs of operation" and to pay as rental to Goltra 1/15 of 1 per cent. per day on the cost of the towboats, which was then assumed to be

$400,000 each, and 1/10 of 1 per cent. per day on the cost of the barges, assumed to be $110,000 each (R. 66, 67). The lease was to run for five years, with an option to Standard Oil Company of Louisiana to renew for a like period (R. 66, 67). It is further conceded that Goltra was willing and desired to accept the offer, but that by reason of the seizure by the United States and the resulting injunction litigation, he was unable to assure Standard Oil Company of possession of the fleet for the term of the lease (R. 66, 67).

The testimony to establish this offer was given by those who made the offer, the then Marine Superintendent and Vice President respectively of Standard Oil Company of Louisiana, and by Goltra and one of his employees (R. 58). When this testimony was introduced, the United States made no objection to its introduction in evidence (R. 68). The United States now so stipulates (R. 68).

None the less, the Court of Claims refused to make a finding as to this offer and summarily rejected it on the authority of *Sharp* v. *United States,* 191 U. S. 341, 348, 349; *Clarke* v. *Hot Springs Electric Light & Power Co.,* 10 Cir., 55 F. (2d) 612 and *Sommers* v. *Commissioner of Internal Revenue,* 10 Cir., 63 F. (2d) 551 (R. 54).

The decision in the *Sharp* case does not compel the rejection of the evidence here. The evidence there rejected was the testimony of a claimant in a condemnation proceeding to the effect that a certain offer for his property had been made to him. The evidence was held inadmissible, principally because it was hearsay and would accordingly permit no cross-examination of the offeror on facts relevant to establish the good faith of the offeror, the reason for his desire of purchase, his ability and actual desire to

pay the amount offered. Furthermore, the opinion of this Court was addressed to offers relating to real estate and not to chattels.

This Court recognized in the *Sharp* case that the policy which led to the rejection of the testimony in that case was not all-inclusive. The Court indicated that an offer properly proved might be admissible and of probative value if it was

> "... an honest offer, made by an individual capable of forming a fair and intelligent judgment, really desirous of purchasing, entirely able to do so, and to give the amount of money mentioned in the offer ...". (p. 349).

In the present case, each of the objections raised in the *Sharp* case has been met. The offer was proved by testimony of the offeror, as well as the offeree (R. 68). The officials of Standard Oil Company of Louisiana testified in the case and were subjected to cross-examination (R. 68). The United States on this appeal concedes that the offer was made, that it was made in good faith, that it was made by an offeror able financially to carry out the offer, and that the fleet for which the offer was made was desired by Standard Oil Company of Louisiana to carry on a certain phase of its established business (R. 66-67). Furthermore, E. F. Wieck, the Marine Superintendent of Standard Oil Company, who was one of the witnesses to the offer, was an expert in river transportation and certainly an individual capable of forming a fair and intelligent judgment as to the rental value of the fleet (R. 67, 68, 70-71).

It is accordingly undisputed that the offer was an honest one, made fairly and intelligently by officers of a com-

pany "really desirous of purchasing [leasing], entirely able to do so, and to give the amount of money mentioned in the offer" (191 U. S., at p. 349). Assuming the applicability of the *Sharp* case, therefore, to offers involving chattels and applying the rule there stated, the offer in the present case was admissible.

The decisions in *Sommers* v. *Commissioner of Internal Revenue,* 10 Cir., 63 F. (2d) 551, and *Clarke* v. *Hot Springs Electric Light & Power Co.,* 10 Cir., 55 F. (2d) 612, add nothing to the law on this subject. Both cases without discussion reject hearsay evidence of offers on the basis of the *Sharp* decision. The rejection of the evidence in the *Sommers* case was apparently only on the ground that the offer was remote in point of time.

On the other hand, the lower federal courts, both before and after the decision in the *Sharp* case, have repeatedly admitted in evidence proof of offers on the question of the value of personal property. *Republican Newspaper Co.* v. *Northwestern Associated Press,* 8 Cir., 51 Fed. 377 (value of a newspaper franchise); *Heiner* v. *Crosby,* 3 Cir., 24 F. (2d) 191, 193 (value of stock); *Buena Vista Land & Development Co.* v. *Lucas,* 9 Cir., 41 F. (2d) 131, 132-133 (value of a chose in action); *The Waalhaven,* (S.D.N.Y.) 1 F. Supp. 396, 397, aff'd 64 F. (2d) 25, cert. denied, 289 U. S. 752 (value of potash); *Manufacturers Paper Co.* v. *Commissioner of Int. Rev.,* 2 Cir., 89 F. (2d) 684 (value of stock).

Apposite to the present facts is the opinion of the Circuit Court of Appeals for the Second Circuit in *Manufacturers Paper Co.* v. *Commissioner of Int. Rev.,* 89 F. (2d) 684 (*supra*). In distinguishing the *Sharp* case, the court said (p. 686):

> "The bona fides of the offer, the financial responsibility of the offeror, and his qualifications to know the value of the property were proved without dispute by his own testimony and that of a banker ready to supply the money. Hence the criticisms leveled against the evidence of offers in general, as in Sharp v. United States, 191 U. S. 341, 349, 24 S. Ct. 114, 48 L. Ed. 211, were satisfactorily met."

Other courts have also held offers admissible as evidence on the issue of chattel values. *German-Am. etc. Bank* v. *Spokane etc. Nav. Co.*, 49 Wash. 359, 360-361; *Rottlesberger* v. *Hanley*, 155 Iowa 638, 647; *Georgia, Florida & Alabama Railway Co.* v. *Spivey*, 14 Ga. App. 157; *The Cygnus*, Roscoe, *Damages in Marine Collisions*, 3rd ed. pp. 154, 157, not officially reported. See also *Gatling* v. *Newell*, 9 Ind. 572, 583[1].

In view of contentions heretofore made by the United States relative to the offer, we may point out that in many of the cases in which an offer was admitted in evidence, it was done particularly because the property was "of the peculiar kind" and therefore did "not possess what is commonly called a market value." *Republican Newspaper Co.* v. *Northwestern Associated Press*, 51 Fed. 377, 378-379 (*supra*). *Manufacturers Paper Co.* v. *Commissioner of Int. Rev.*, 89 F. (2d) 684, 686, (*supra*); *Buena Vista Land & Development Co.* v. *Lucas*, 41 F. (2d) 131, (*supra*). See also *Heiner* v. *Crosby*, 24 F. (2d) 191, 193, (*supra*).

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[1]There is a tendency, even in real estate cases to admit evidence of offers made in good faith and proved beyond question. *North American Telegraph Co.* v. *Northern Pac. Ry. Co.*, 8 Cir., 254 Fed. 417, 418, 419; *Faust* v. *Hosford*, 119 Iowa 97, 104; *City of Chicago* v. *Lehmann*, 262 Ill. 468, 474.

Thus, if there were anything to the contention of the United States that by reason of the unique nature of the boats and barges here involved there was no actual market value, then the admissibility of the Standard Oil offer is emphasized. That offer is the best evidence of "the sum that would in all probability result from fair negotiations between an owner who is willing to sell and a purchaser who desires to buy" (*Brooks-Scanlon Corp.* v. *United States,* 265 U. S. 106, 124, *supra; Olson* v. *United States,* 292 U. S. 246, 257, *supra*).

In addition to all this, the objection made to the offer came too late. When the offer was proved by four different witnesses, the United States made no objection to the introduction of this testimony in evidence (R. 68). Whatever may be said as to the original competency of the evidence relative to this offer, it is clear that once admitted, the evidence is relevant and material. The offer was not made, as the Court of Claims intimates, at a remote time. The fleet was seized in March, 1923 (Finding 28, R. 41). It was returned to Goltra under the temporary restraining order in September, 1924 (Finding 39, R. 44) and the offer was made in May, 1925 (R. 67). On the latter date, Goltra was in possession of the fleet, and that date was within the five-year lease period of the original contract. In the light of the undisputed expert testimony that the rental value of the fleet remained the same from the date of the seizure until the time of the testimony in 1936 and 1937 (R. 70-72), it is clear that there is nothing remote, in point of time, about this offer.

Accordingly, the general rule must be applied to this evidence, viz., that evidence, even though it may have been originally incompetent, must be considered in so far as it

is relevant and material if no objection was made at the time when the evidence was introduced. *Schlemmer* v. *Buffalo, Rochester, &c. Ry.*, 205 U. S. 1, 9; *Diaz* v. *United States*, 223 U. S. 442, 450; *Spiller* v. *Atchison, T. & S. F. Ry. Co.*, 253 U. S. 117, 130; *Rowland* v. *St. Louis & S. F. R. R. Co.*, 244 U. S. 106, 108; *Dowling* v. *Jones*, 2 Cir., 67 F. (2d) 537, 539. Apposite here is the statement of this Court in the *Diaz* case (p. 450):

> "So, of the fact that it was hearsay, it suffices to observe that when evidence of that character is admitted without objection it is to be considered and given its natural probative effect as if it were in law admissible."

This rule has heretofore been recognized by the Court of Claims. *McIntyre* v. *United States*, 52 C. Cls. 503, 508-509; *Camden Iron Works* v. *The United States*, 47 C. Cls. 124, 128; *Lynch* v. *United States*, 6 C. Cls. 246, 250. Nor is there anything in the procedure of the Court of Claims involving the taking of evidence before a Commissioner which excuses the failure to object to evidence at the time of its introduction. Rule 44 of the Rules of that court clearly shows that objection must be made and exception must be taken if evidence is deemed to be inadmissible.[1]

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[1] "PROCEDURE BEFORE COMMISSIONERS OF THE COURT.

44. The commissioner shall rule upon the materiality, relevancy, or admissibility of any evidence offered and the form of any question asked. If objection is made to the form of the question and said objection is sustained by the commissioner, the question shall be reframed to comply with the ruling of the commissioner thereon. If objection is made

THIRD: THE COURT OF CLAIMS PROPERLY AWARDED A SUM MEASURED BY INTEREST AS PART OF JUST COMPENSATION.

A. The award of a sum measured by interest as part of just compensation is required by the Fifth Amendment and directed by the special jurisdictional act.

The Court of Claims has found that Colonel Ashburn, pursuant to orders of the Acting Secretary of War, seized Goltra's fleet without the consent of Goltra or his employees "for the use and benefit of the United States" (Findings 27, 28, R. 41; Opinion, R. 52). The Court also found that the United States has retained possession of the fleet and caused it to be operated as part of its own barge line (Finding 40, R. 44).

These findings, to none of which the United States has excepted or assigned error, establish the taking of private property for public use. Just compensation under the Fifth Amendment is therefore payable to plaintiffs. Congress,

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to the evidence sought to be elicited by the question the commissioner shall rule thereon, and in the event the ruling is adverse to the party offering the evidence said party may except thereto and make an offer to prove, which offer shall consist of a succinct statement of the evidence sought to be elicited by the question. When documentary evidence is offered and objection is made thereto, the commissioner shall rule upon the same, and if the ruling is adverse to the party offering said evidence an exception may be taken to the same and the document or documents offered shall be marked by the reporter for identification, and by him filed with the transcript of the testimony and evidence in the case. Any exception taken by either party to the commissioner's ruling shall be noted at the time it is taken. The exceptions so taken will be considered by the court at the hearing on the report of the commissioner. Objections to questions or answers shall be explicitly but briefly stated."

in enacting the special jurisdictional act, recognized this and directed payment accordingly by requiring the court to render judgment for just compensation (R. 29).

That a sum measured by interest upon the value of the property taken, from the date of taking to the time of payment, is a part of just compensation under these circumstances, has been uniformly recognized since the decision by this Court in *Seaboard Air Line Ry.* v. *United States,* 261 U. S. 299. Property had there been taken by the United States under the wartime Lever Act (40 Stat., c. 53, p. 276). That act authorized the payment of just compensation for property so taken. This Court held that a sum, measured by interest, was a part of just compensation guaranteed by the Constitution, and that such a sum, measured by interest, must be included in the award to the claimant in a suit under the Lever Act. The Court said (p. 306): "The Constitution safeguards the right and § 10 of the Lever Act directs payment." This Court thus decided that the use of the words "just compensation" in an Act of Congress directed the payment of the just compensation guaranteed by the Fifth Amendment.

As the logical consequence of this decision, a sum measured by interest, not as interest but as part of just compensation, has been allowed by this Court in every case where the Government took private property or cancelled private rights under Congressional Acts specifying the measure of recovery to be just compensation. This has been true equally in cases which approximated the strict exercise of the power of eminent domain and other cases involving a somewhat different basis of action. A sum measured by interest has been made a part of awards for just compensation prescribed in Acts of Congress for land taken under

such acts, *Seaboard Air Line Ry.* v. *United States,* 261 U. S. 299; *United States* v. *Benedict,* 261 U. S. 294; for leases taken under such Acts, *Phelps* v. *United States,* 274 U. S. 341; see also *A. W. Duckett & Co., Inc.* v. *United States,* 274 U. S. 765, reversing 62 C. Cls. 781, judgment for interest entered 64 C. Cls. 700; for products and supplies ordered under such Acts, *Liggett & Myers* v. *United States,* 274 U. S. 215; for the taking of contract rights under such Acts, *Brooks-Scanlon Corp.* v. *United States,* 265 U. S. 106; and for the cancellation or suspension of contracts under such Acts, *DeLaval Steam Turbine Co.* v. *United States,* 70 C. Cls. 51, aff'd 284 U. S. 61; *Barrett Co.* v. *United States,* 273 U. S. 227, judgment for interest entered 66 C. Cls. 293. This Court has more recently reviewed the principles established by the foregoing decisions in *Jacobs* v. *United States,* 290 U. S. 13.

The Court of Claims likewise, in an unbroken series of decisions, has held a sum measured by interest to be a part of the recovery where Congress has stated that just compensation should be the measure of recovery.[1]

When Congress passed the special jurisdictional act herein it knew the meaning of the phrase "just compensa-

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[1] *Benjamin C. Grymes* v. *United States,* 58 C. Cls. 398; *Minnie Moore, Administratrix* v. *United States,* 60 C. Cls. 326; *Yorkview Finance Corp.* v. *United States,* 60 C. Cls. 646; *F. C. Mattern & F. L. Carre, Execs.* v. *United States,* 66 C. Cls. 559; *Atlantic Refining Co.* v. *United States,* 59 C. Cls. 108; *Consorzio Veneziano* v. *United States,* 64 C. Cls. 11; *Ocean S. S. Co. of Savannah* v. *United States,* 64 C. Cls. 98, certiorari denied 277 U. S. 584; *John Russell Smith* v. *United States,* 67 C. Cls. 182; *Grays Harbor Motorship Corp.* v. *United States,* 71 C. Cls. 167; *Nitro Powder Co.* v. *United States,* 71 C. Cls. 369, 374; *Wheeling Steel Corp.* v. *United States,* 71 C. Cls. 571; *Virginia Engineering Co., Inc.* v. *United States,* 89 C. Cls. 457.

tion" as it had been interpreted in innumerable decisions by this Court and by the Court of Claims. Indeed, Congress had appropriated millions of dollars to pay awards including sums measured by interest under provisions of statutes which require the award of just compensation. In these circumstances the presumption arises that Congress used the words "just compensation" advisedly and in the full legal significance given them by repeated judicial interpretation. *McCool* v. *Smith,* 1 Black 459, 469; *Case of the Sewing Machine Companies,* 18 Wall. 553, 584; *The "Abbotsford",* 98 U. S. 440, 444; *United States* v. *Mooney,* 116 U. S. 104, 106; *Kepner* v. *United States,* 195 U. S. 100, 124; *United States* v. *Merriam,* 263 U. S. 179, 187; *Hecht* v. *Malley,* 265 U. S. 144, 153; *Poe* v. *Seaborn,* 282 U. S. 101, 116.

The intention of Congress to authorize recovery here, on the basis of the then known decisions defining just compensation, is emphasized by the fact that the special jurisdictional act authorized the award of just compensation "for certain vessels and unloading apparatus taken . . . for the use and benefit of the United States" (R. 29). Such language unmistakably stamps this case as one to which Congress wished the constitutional principles of just compensation to be applied. The unchallenged finding of the Court of Claims that the seizure of the fleet was in fact "for the use and benefit of the United States" (Finding 28, R. 41) compels the application of these well settled principles and requires the inclusion in the judgment of a sum measured by interest.

To avoid this conclusion, the United States urges that the taking here was tortious and that, therefore, a different rule should be invoked. This contention lacks merit. The

argument of the United States is wholly without foundation in the authorities which it cites.

A good part of the Government's argument relates to the uncontroverted proposition th .t in the absence of specific legislation a claimant whose property was taken by unauthorized acts of Government officers may not sue the United States. The Government, in attempting to apply this juridical result to the present case, misconceives entirely the basis of the decisions. The cases do not hold, as the United States argues, that a claimant, whose property has been seized and used without proper authorization by a United States officer for the Government's benefit, is without a legal or constitutional right. On the contrary, the cases hold that the claimant has a right but that he lacks a remedy against the United States by reason of the explicit provisions of the Court of Claims Act (Judicial Code § 145, 28 U. S. C. A. § 250) and the Tucker Act (Judicial Code § 24, 28 U. S. C. A. § 41(20). In such cases the United States, in the absence of specific legislation stands on its sovereign prerogative and does not consent to be sued. But "The absence of legal liability in a case where but for its sovereignty it would be liable does not destroy the justice of the claim against it."[1]

The basis of the decisions upon which the Government relies is well illustrated in *Hooe* v. *United States,* 218 U. S. 322. There Acts of Congress authorized the expenditure of certain sums to pay the rental for quarters occupied by the

[1]From the opinion of this Court delivered by Mr. Justice Holmes in *United States* v. *The Thekla* 266 U. S. 328, 340, where interest was allowed as part of .e recovery against the United States in an admiralty case in which the United States had voluntarily submitted itself to the jurisdiction of the courts.

Civil Service Commissions. The plaintiff landlord claimed additional sums by reason of the use and occupancy of quarters by the Commission and brought suit in the Court of Claims under the Tucker Act. Some basis for plaintiff's claim was afforded by the acts of certain Government agents, including the Secretary of the Interior. This Court, however, held that the Congressional authorization limited the expenditures to the amounts stated in the acts and that any action by Government officers tending to impose liability on the Government in excess of such amounts so authorized gave rise to no cause of action against the United States. Judgment below dismissing the petition for lack of jurisdiction was affirmed. This Court said (pp. 333-334):

> "It is equally clear that the Secretary could not, by his acts, create a state of things from which, in the absence of legislation on the subject, an implied contract could arise under which the Government would be liable, by reason of its *constitutional* duty, to make just compensation for the use of private property taken for public purposes. In such a case the remedy is with Congress, and not with the courts. * * * If the circumstances justify such a course, Congress in its discretion can intervene and do justice to the owner of private property used by officers of the Government in good faith for public purposes, although without direct legislative authority. The plaintiffs' remedy is in that direction."

Similar language is found in *Gibbons* v. *United States,* 8 Wall. 269, 275-276, and *Filor* v. *United States,* 9 Wall. 45, 49.

The decisions in these cases relied upon by the United States are not that the claimants whose property has been taken should be defeated on the merits, but that the courts

under the general statutes in effect at the time of the respective decisions had no jurisdiction over the claims. This is pointedly illustrated in the decisions in *Hill* v. *United States,* 149 U. S. 593, 599, and *Tempel* v. *United States,* 248 U. S. 121, 130-131 where this Court reversed the decisions below giving judgment in favor of the United States and held that actions should have been dismissed for want of jurisdiction. In the other principal cases relied on by the United States, this Court affirmed judgments below dismissing complaints for want of jurisdiction. *Langford* v. *United States,* 101 U. S. 341, 344-346; *Hijo* v. *United States,* 194 U. S. 315, 321-322; *Klebe* v. *United States,* 263 U. S. 188 (affirming so much of decision of Court of Claims as dismissed the cause of action sounding in tort, there was no appeal from that part of the judgment in plaintiff's favor on an express contract); *Pearson* v. *United States,* 267 U. S. 423.

As long as the action against the United States is one founded in a tort, the nature of the tort, of course, makes no difference. The rule is the same, whether the tort arises from the act of an officer in excess of his authority or whether the tort lies in the taking by an officer of the United States of property under a claim of right where in fact title is in the plaintiff. Where the United States has seized and used property under a claim of title, it could never be argued that there existed an implied contract on the part of the United States to pay any plaintiff the value of such property. If the claim of the United States were proper, then the plaintiff would have no right. If, on the other hand, the claim of the United States were groundless, then the officer of the United States who had seized the property committed a tort for which Congress has not pro-

vided redress except in specific cases. Accordingly, in the absence of special jurisdictional acts, complaints based on the theory that the claim of the United States was unlawful have been dismissed for want of jurisdiction. *Hill* v. *United States,* 149 U. S. 593, 599; *Tempel* v. *United States,* 248 U. S. 121, 130-131; *Langford* v. *United States,* 101 U. S. 341, 344-346; *Klebe* v. *United States,* 263 U. S. 188. These decisions, however, are not equivalent to determinations that there had been no taking. If Congress had provided a remedy, there is nothing in these decisions to indicate that the measure of compensation would have been different from that enjoined by the Fifth Amendment.

Nor do we find anything in certain other decisions by this Court, characterized by the Government as "divergent," to lead to the conclusion that the cases upon which we have just commented, stand for any proposition other than that the claims there asserted were beyond the jurisdiction of the courts.

United States v. *Lynah,* 188 U. S. 445, *United States* v. *Cress,* 243 U. S. 316 and *United States* v. *Great Falls Mfg. Co.,* 112 U. S. 645, were flowage cases. The United States in these cases did not take the property or lands, for which compensation was asked, under a claim of right, but rather contended that, as a matter of law, there had been no taking of any property. In each case, this Court resolved the legal question against the United States and held, accordingly, that there was an authorized taking of plaintiff's property giving rise to an implied contract over which the Court had jurisdiction.

Similarly, in *Hurley* v. *Kincaid,* 285 U. S. 95, 104, injunction to prevent the prospective flowage of plaintiff's land was denied because this Court held that such flowage

would constitute an authorized taking of plaintiff's property and entitle the plaintiff after the taking to recover "just compensation under the Tucker Act in an action at law as upon an implied contract." In *Yearsley* v. *Ross Constr. Co.*, 309 U. S. 18, this Court denied relief to a plaintiff who claimed that the defendant contractor, while engaged in work for the Government, had caused erosion on plaintiff's property because it was held that the plaintiff had a complete remedy against the United States for "just compensation under the Fifth Amendment" (p. 21).

We call attention in passing to the fact that in each of these cases the Court recognized that the recovery on the implied contract would be just compensation as provided in the Fifth Amendment, and this Court, to set at rest all doubts on this score, stated that such compensation would be "the same as that which he might have been awarded had defendants instituted the condemnation proceedings which it is contended the statute requires" (*Hurley* v. *Kincaid*, 285 U. S. 95, 104).

If these decisions have any bearing on the present question, and the United States seems to believe that they do, it is only to emphasize the fact that plaintiffs' difficulty in cases where the taking of property has been designated as tortious was purely one of jurisdiction.

In the present case there is no jurisdictional question. The special jurisdictional act has conferred jurisdiction. The United States did not in the court below, and does not here question the validity of that act or its efficacy to confer jurisdiction. Heeding the admonition of this Court in the *Hooe* case (218 U. S. 322, *supra*), Goltra sought his remedy in Congress and received express authorization to bring this action. The Government is now called upon to

pay the just compensation guaranteed by the Fifth Amendment of the Constitution.

This situation is not a novel one. Congressional action culminating in special jurisdictional acts has hitherto been held efficacious to permit the claimant to recover the just compensation guaranteed by the Constitution, although the original taking in the absence of a special jurisdictional act did not give rise to a cause of action of which the courts could take jurisdiction.

In *United States* v. *Creek Nation,* 295 U. S. 103, the special jurisdictional act conferred upon the Court of Claims jurisdiction "to hear, examine, and adjudicate and render judgment in any and all legal and equitable claims arising under or growing out of any treaty or agreement between the United States and the Creek Indian Nation or Tribe or . . . out of any Act of Congress in relation to Indian affairs" (p. 105). The claim litigated related to land which the United States erroneously treated as part of land ceded by the Creek Nation to the United States. In fact, this land had not been ceded; the United States, however, sold and patented the land in question to settlers. The disposition made by the United States was under a claim that the United States had title to the land in question. None the less, this Court held, under the special jurisdictional act, that the Creek Nation was entitled to recover just compensation, and that such compensation included a sum measured by interest from the date of the taking. The Government now attempts to explain away the force of this case by quoting language from the opinion indicating that the Creek Nation was under the guardianship of the United States. This quotation comes from the part of the opinion dealing with the question of whether the United States actually ap-

propriated and took the lands (295 U. S., at pp. 109-110). It does not relate to the separately numbered division dealing with the amount of compensation. There this Court said (p. 111):

> "But the just compensation to be awarded now should not be confined to the value of the lands at the time of the taking but should include such addition thereto as may be required to produce the present full equivalent of that value paid contemporaneously with the taking. Interest at a reasonable rate is a suitable measure by which to ascertain the amount to be added."

The decision in the *Creek Nation* case, permitting recovery of just compensation including a sum measured by interest, stands for a general rule and is not limited to any unusual situation. Where relief for tortious acts has been afforded by Congress, and where such acts amount to taking of private property for public use, the ordinary measure of just compensation must be applied. In such a situation the tortious acts have been adopted by the United States, and the usual payment of just compensation must be made.

This general rule has been stated by this Court in *Shoshone Tribe* v. *United States*, 299 U. S. 476. That case was brought under a special jurisdictional act conferring upon the Court of Claims jurisdiction "to hear, examine, adjudicate, and render judgment in any and all legal and equitable claims which the Shoshone Tribe of Indians . . . may have against the United States arising under or growing out of" certain treaties or Acts of Congress (299 U. S., note, pp. 484-485). As in the *Creek Nation* case, no specific provision for interest was made, and just compensation

was not even prescribed as the measure of recovery. The claim of the Shoshone Indians under this special act was for compensation for land wrongfully taken from them by officers of the United States and given to another tribe of Indians. This Court pointed out that both the Commissioner of Indian affairs and Congress "continued to act on the assumption that the occupancy of the Arapahoes, initiated, as we have seen, under a military escort, was permanent and rightful" (p. 489). The United States contended that the original taking had been tortious and that, accordingly, no sum measured by interest should be allowed. This Court, reversing the Court of Claims, held that a sum measured by interest constituted an inherent part of the recovery. Mr. Justice Cardozo, speaking for the Court, said (pp. 496-497):

> "The claimant's damages include such additional amount beyond the value of its property rights when taken by the Government as may be necessary to the award of just compensation, the increment to be measured either by interest on the value or by such other standard as may be suitable in the light of all the circumstances.
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> The fact is unimportant that the taking was tortious in its origin, if it was made lawful by relation. *Crozier* v. *Krupp, supra.* The fact also is unimportant that it was a partial taking only, and that eviction was not complete. *Jacobs* v. *United States,* 290 U. S. 13, 16; *United States* v. *Cress,* 243 U. S. 316, 327-330; *Hurley* v. *Kincaid,* 285 U. S. 95, 104. Finally the fact is unimportant, there having been an appropriation of property within the meaning of the Fifth Amendment, that the jurisdictional act is silent as to an award of interest or any substitute therefor. *United States* v. *Creek Nation, supra,*

> pp. 110, 111. Cf. *Yankton Sioux Tribe* v. *United States,* 272 U. S. 351, 359. Given such a taking, the right to interest or a fair equivalent, attaches itself automatically to the right to an award of damages. *Jacobs* v. *United States, supra; Phelps* v. *United States,* 274 U. S. 341; *Brooks-Scanlon Corp.* v. *United States,* 265 U. S. 106, 123; *Seaboard Air Line Co.* v. *United States,* 261 U. S. 299, 306. These cases distinguish *United States* v. *North American Co.,* 253 U. S. 330, cited by the Government which 'rested upon its special facts.'"

There is nothing in this statement of the rule which would limit its application to Indian cases.

The applicable rule has also been clearly recognized by this Court in *Crozier* v. *Krupp,* 224 U. S. 290. Injunction to prevent the use of plaintiff's patents by the United States was denied on the ground that the Act of June 25, 1910 (36 Stat., c. 423, p. 851) furnished an adequate remedy for the infringement of plaintiff's patent by officers of the United States. The Act in question provided that whenever a patented invention "shall hereafter be used by the United States without license of the owner thereof . . . such owner may recover reasonable compensation for such use by suit in the Court of Claims." It was apparently the claimant's contention that this Act might not apply because the United States had commenced the use of the patent prior to the passage of the Act. The Court conceded that prior to the passage of the Act in the absence of facts giving rise to an implied contract, the United States could not have been sued for the use of the patent, but this Court said (p. 305):

> "The adoption by the United States of the wrongful act of an officer is of course an adoption of the

> act when and as committed, and causes such act of the officer to be, in virtue of the statute, a rightful appropriation by the Government, for which compensation is provided."[1]

Subsequently this Court, in *Waite* v. *United States,* 282 U. S. 508, was specifically called upon to decide whether the statute discussed in the *Crozier* case entitled a claimant to a sum measured by interest. The statute had been somewhat amended and provided (Act of July 1, 1918, 40 Stat., c. 114, p. 705):

> "That whenever an invention described in and covered by a patent of the United States shall hereafter be used or manufactured by or for the United States without license of the owner thereof or lawful right to use or manufacture the same, such owner's remedy shall be by suit against the United States in the Court of Claims for the recovery of his reasonable and entire compensation for such use and manufacture."

The statute did not make legal the use of the patent by the United States "without license . . . or lawful right" but simply provided a remedy. Use of the patent in the absence of contract, express or implied, constituted tortious conduct. None the less, this Court held that a sum measured by interest should be allowed as part of the "entire compensation" by analogy to the cases decided under statutes in which Congress had provided for just compensation (*Seaboard Air Line Ry.* v. *United States,* 261 U. S. 299; *Brooks-Scanlon Corp.* v. *United States,* 265 U. S. 106;

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[1]This language has been more recently adopted by the Court in *Yearsley* v. *Ross Constr. Co.,* 309 U. S. 18, 22.

Liggett & Myers v. *United States,* 274 U. S. 215; *Phelps* v. *United States,* 274 U. S. 341).

These decisions are authoritative precedents here. Contrary to the Government's contention now, it is apparent that in each of the cases the ratification of the original tortious act by the United States is to be found in the following conduct: first, in the retention of benefits by the United States, and second, in the passage of a jurisdictional act conferring upon the Court of Claims jurisdiction to hear and determine the plaintiff's case. Nothing more is required. Both of these elements are present here. It is conceded that the original seizure of the Goltra fleet was for the use and benefit of the United States (Finding 28, R. 41) and that the United States has continuously operated the fleet as part of its own barge line (Finding 40, R. 44). The special jurisdictional act which here provides for "just compensation . . . for certain vessels and unloading apparatus taken, whether tortiously or not . . . by the United States under orders of the Acting Secretary of War, for the use and benefit of the United States" (R. 29) constitutes a much more specific ratification and basis for the award of just compensation than the acts in the other cases.

There is no force in the Government's lengthy argument that the special jurisdiction act does not constitute ratification because Congress left to the court the determination of the validity of Goltra's claim. The special jurisdictional acts in the *Creek Nation* (295 U. S. 103) and *Shoshone Tribe* (299 U. S. 476) cases, and the general jurisdictional act in *Crozier* v. *Krupp,* 224 U. S. 290, and *Waite* v. *United States,* 282 U. S. 508, did no more than confer upon the Court of Claims the power to adjudicate the validity of claims.

The impression which the Government seeks to leave that Congress, when it passed the jurisdictional act, had no knowledge of the controversy between Goltra and the United States, is answered by a reference to the committee reports (Appendix A, *infra*, pp. i-xii), which show a full and complete knowledge by Congress of the entire controversy, including the previous judicial decisions which indicated beyond a shadow of a doubt that the United States had claimed that the Goltra fleet had been rightfully seized by it.

In these circumstances the passage of the special jurisdictional act can indicate only specific adoption and ratification by Congress of the seizure of Goltra's fleet. The Government's argument that Congress should be under no duty to reject benefits conferred upon the United States by unauthorized acts of its agents may be perfectly sound, but it has no application here. There is no question of rejection or acquiescence by silence. Congress has taken positive action and has specifically said that if the seizure for the use and benefit of the United States was wrongful, then it would adopt and stand back of the acts of the Government's officers and agents and make just compensation for the taking.

We conclude from the decisions heretofore discussed that ratification of the seizure of Goltra's fleet, for the use and benefit of the United States, is sufficient basis for a valid claim against the United States for the just compensation specified in the Fifth Amendment. This would be true, irrespective of the original nature of the taking and irrespective of whether the Congressional Act specified recovery as just compensation. The direction in the Act of the payment of just compensation, however, makes this case indistinguishable from *Seaboard Air Line Ry.* v. *United States*, 261 U. S. 299.

B. The special jurisdictional act alone compels the award of a sum measured by interest as part of just compensation.

While we believe that a sum measured by interest should be awarded here as part of the just compensation required by the Fifth Amendment and directed by the special jurisdictional act, we do not acquiesce in the Government's contention that the words "just compensation" in the special jurisdictional act are not alone sufficient to require an award measured according to the standards of just compensation laid down by this Court.

The argument that the words "just compensation" describe Goltra's claims and not the measure of recovery is unfounded. In the title of the Act, Congress described Goltra's claims as "the Claims of Edward F. Goltra against the United States arising out of the taking of certain vessels and unloading apparatus" (R. 29). If Congress had intended merely to describe Goltra's claims by using the phrase "just compensation" in the body of the Act, it is strange that those words were omitted from the description of the claims in the title. Furthermore, Congress has unmistakably shown that it meant judgment to be rendered here for just compensation in the Constitutional sense by describing the subject matter for which just compensation was to be rendered as "certain vessels and unloading apparatus taken . . . by the United States . . . for the use and benefit of the United States" (R. 29). It is hard to conceive of language which could more aptly indicate the intention of Congress that the Court should award to Goltra a recovery measured as recoveries are measured for takings under the power of eminent domain.

The reports of the Congressional committees indicate that Congress was fully aware of the long delay occasioned by the Government's consistent opposition to efforts by Goltra to obtain justice (Appendix A, pp. i-xii, *infra*). It is small wonder, therefore, that Congress described the measure of recovery to be just compensation which Congress knew would include a sum measured by interest.

It is unnecessary to repeat the argument made above (*supra,* pp. 37-38) that Congress passed the special jurisdictional act with full knowledge of a multitude of decisions, both in this Court and in the Court of Claims, holding that a recovery of just compensation must include a sum measured by interest. These decisions were made in the decade immediately preceding the enactment of the special jurisdictional act herein. In answer to this argument, it avails the Government little to point out that in a few early state decisions the phrase "just compensation" may have been loosely used to describe the theory of restitution to be made between private litigants. This Court, in *Hetzel* v. *Baltimore & Ohio Railroad,* 169 U. S. 26, 37, did not use the phrase "just compensation" as equivalent to legal damages, but held merely that on the facts before it recovery should have been allowed on principles having "their foundation in the idea of just compensation for wrongs done" (p. 37). Furthermore, this Court held that proper instructions to the jury should have allowed them to add a sum "as was equal to six per cent interest on such value" (p. 37).

In spite of the Government's learned research, it fails to cite a single case in which this Court has held that a sum measured by interest should not be allowed where Congress has stated that recovery shall be just compensation. We

agree that there is no such case.[1] Conversely, we believe that in every case in which Congress has said that just compensation is the measure of recovery a sum measured by interest has been allowed. The cases in which this is true are not all cases which can be summarily dismissed as cases of taking under the power of eminent domain (see cases cited, p. 37 *supra*). For example, in *Grays Harbor Motorship Corp.* v. *United States,* 71 C. Cls. 167, *Nitro Powder Co.* v. *United States,* 71 C. Cls. 369 and *Wheeling Steel Corp.* v. *United States,* 71 C. Cls. 571, the acts of the United States in cancelling or suspending contracts were acts of breach of contract permitted by statutory provisions on the condition that just compensation be paid for the breach. Recovery of a sum measured by interest was awarded in each case. The refusal of the United States to perform a contract, even though sanctioned by statutory authority, can hardly be said to constitute a taking by the power of eminent domain, as such a taking has been generally understood.

Accordingly, we submit that wherever Congress has made the measure of recovery just compensation, a sum measured by interest must be allowed. It would seem strange for a court to hold that the words "just compensation" in the Fifth Amendment call for one measure of recovery and that precisely the same words in an Act of Congress call for a different type of recovery.

That "just compensation" must be given a uniform interpretation whether used in the Constitution or in Acts of Congress was recognized by the Court of Claims in

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[1]We exclude from this statement, of course, cases in which this Court has held that the delay in payment was occasioned solely by the claimant's failure to accept adequate payment tendered.

Virginia Engineering Co., Inc. v. *United States,* 89 C. Cls. 457. The special jurisdictional act in that case specifically provided for judgment for just compensation, even though the action was clearly one for breach of contract. The Court of Claims decided that Congress had acted in the light of repeated judicial interpretation of the phrase "just compensation" and that a sum measured by interest was an inherent part of the recovery to be awarded. The Government did not petition for a review of that decision. Congress has since appropriated for the payment of this judgment including a sum measured by interest. The construction placed by the Court of Claims on the words "just compensation" has thus been approved.

There is no conflict between the *Virginia Engineering Co.* decision and that in *Squaw Island Freight Term. Co.* v. *United States,* 89 C. Cls. 269. The special jurisdictional act in the latter case authorized the court to render judgment for "just compensation to it for loss of property and/or damages occasioned by the breaking of an inadequate and/or improperly and insufficiently constructed Government dike" (p. 277, footnote). The court denied interest because the recovery awarded was not for just compensation but under the alternative clause for damages. In denying interest, the Court said (p. 278):

> ". . . but it is clear that it cannot recover interest on the damages sustained by reason of the failure of the defendant to maintain an adequate and properly constructed dike to protect plaintiffs' property from damage or to exercise reasonable diligence in repairing the same after the break on December 18, 1921, and before the damage sustained by plaintiff occurred."

All of the decisions in which just compensation is the measure of recovery have awarded a sum measured by interest as a part of such recovery. These precedents were properly followed by the Court of Claims in the present case.

The Government urges that the opinion in *Seaboard Air Line Ry.* v. *United States*, 261 U. S. 299, indicates that this Court did not treat the phrase "just compensation" in a Congressional Act as requiring the addition of a sum measured by interest. This Court pointed out, in the language quoted by the Government, that there was no specific provision for interest in Section 10 of the Lever Act. With this conclusion no one, of course, can disagree. But the opinion of this Court indicates clearly that the provision for just compensation in the Lever Act was regarded as synonymous with the requirement set out in the Fifth Amendment. This Court said (p. 305):

> "It is not suggested in this case that the provisions of § 10 of the Lever Act do not meet the constitutional requirement."

And the Court concluded that the phrase "just compensation" in the Lever Act was synonymous with the same phrase as used in the Fifth Amendment and accordingly directed payment of a sum measured by interest. That decision is wholly consistent with our contention that the phrase "just compensation" in the special jurisdictional act must be similarly construed.

In none of the cases referred to by the Government in which interest was not allowed against the United States did the special jurisdictional act under which suit was brought provide for a recovery of just compensation. In *Boston Sand Co.* v. *United States*, 278 U. S. 41, 46, the di-

rection was to enter judgment "for the amount of the legal damages sustained." The special jurisdictional act in *United States* v. *Commonwealth Line,* 278 U. S. 427, 428, was similar to but even more limited than the Act in the *Boston Sand Co.* case. In *Nantasket Beach Steamboat Co.* v. *United States* (D. C. Mass.), 297 Fed. 656, 657, the Act likewise provided for the determination of the amount "of the legal damages sustained". In *Pennell* v. *United States,* (D. C. Maine) 162 Fed. 75, 76-77, the amount of recovery was also stated in terms of damages. The decision in *Cherokee Nation* v. *United States,* 270 U. S. 476, only held that no more interest was due on Indian claims than had previously been allowed. In *Tillson* v. *United States,* 100 U. S. 43, 45, no interest was allowed because the jurisdictional act merely authorized the court to decide the "amount equitably due . . . for such loss or damage . . .".

CONCLUSION

On the appeal of the United States the judgment below should be affirmed. On the appeal of cross-appellants the judgment below should be reversed with directions to consider the additional factors above set forth in points First and Second in arriving at an award of just compensation.

Respectfully submitted,

RICHARD E. DWIGHT,
HERMAN J. GALLOWAY,
JOHN F. CASKEY,
FREDERICK W. P. LORENZEN,
Counsel for Appellees—
Cross-Appellants

APPENDICES

APPENDIX A

73D CONGRESS
2d Session

REPORT
No. 828

HOUSE OF REPRESENTATIVES

EDWARD F. GOLTRA

FEBRUARY 22, 1934.—Committed to the Committee of the Whole House and ordered to be printed

MR. BROWNING, from the Committee on the Judiciary, submitted the following

REPORT

[To accompany H.R. 4398]

The Committee on the Judiciary, to whom was referred the bill (H.R. 4398) conferring jurisdiction upon the Court of Claims of the United States to hear, consider, and render judgment on the claims of Edward F. Goltra against the United States arising out of the taking of certain vessels and unloading apparatus, after consideration, reports the same favorably to the House with amendments, with the recommendation that the bill as amended do pass.

The committee amendments are as follows:

Page 2, line 6, after the word "apparatus" insert the following words: "but no suit shall be brought after the expiration of one year from the effective date of this act".

Page 2, line 11, after the word "Court" insert the word "of".

There is attached hereto and made a part of this report a communication, addressed to the Chairman of the Committee on the Judiciary, in which the Attorney General states:

From the investigation made it appears that Goltra has never had his day in court. He has exhausted all the or-

dinary means of obtaining a hearing. The Court of Claims is the only forum in which he can now be heard, and the passage of this bill is the only method by which he can enter that forum.

The Attorney General's letter, above referred to, is as follows:

DEPARTMENT OF JUSTICE,
OFFICE OF THE ATTORNEY GENERAL,
Washington, D. C., January 16, 1934.

Hon. HATTON W. SUMNERS,
Chairman Committee on the Judiciary,
House of Representatives, Washington, D.C.

DEAR MR. SUMNERS: In reply to your letter of June 8, 1933, requesting a report and recommendation with reference to H. R. 4398, conferring jurisdiction upon the Court of Claims of the United States to hear, consider, and render judgment on the claims of Edward F. Goltra against the United States arising out of the taking of certain vessels and unloading apparatus, I beg to advise that I have caused the records and files of this Department to be examined and find from such examination:

On May 28, 1919, Mr. Goltra entered into a contract with the United States by the terms of which he was to operate upon the Mississippi River and its tributaries a fleet of 19 barges and 4 towboats built and owned by the Government. About 8 months after the delivery of the fleet to Mr. Goltra the boats and barges, or a part of them, were seized by a United States Army officer acting under direction of the Acting Secretary of War. A great deal of litigation ensued. The first legal proceeding was an injunction suit brought by Mr. Goltra against the Secretary of War and the Army officer who seized the fleet. Upon hearing, a temporary injunction was issued, and appeal was taken to the Circuit Court of Appeals where the lower court was reversed on the ground that the United States was a neces-

sary party; and on certiorari to the Supreme Court a decision adverse to Mr. Goltra was rendered. Subsequent proceedings in the courts of the District of Columbia and before the Departments were disposed of without hearing upon the merits, it being deemed that the decision of the Supreme Court had finally disposed of the entire matter.

The hearing in the Supreme Court was on an appeal from an order directing the issuance of a temporary injunction. The testimony in the trial court was directed to the propriety of issuance of a temporary injunction, and the principal issue was one of jurisdiction—i.e., whether the United States was a necessary party to the suit. At the hearing in the lower court a letter from the Secretary of War canceling Goltra's contract and ordering the return of the fleet and written before the seizure, was offered and admitted in evidence; also a similar letter signed by the Chief of Engineers, but written more than a month after the seizure, was offered in evidence but excluded by the trial court as self-serving. This letter of the Chief of Engineers, although excluded as evidence by the trial court, of course appeared in the record.

The contract with the Government under which Goltra had possession of the fleet provided that non-compliance in the judgment of the lessor with any of the terms or conditions of the contract would justify terminating the lease and returning the fleet to the lessor. By the terms of the contract (and it was so held by the Supreme Court), the Chief of Engineers was the "lessor" and was the party designated and authorized to cancel the contract.

The Supreme Court held that the circuit court of appeals was in error in holding that the United States was a necessary party to the litigation, but reversed the lower court's order granting the preliminary injunction and directed judgment against the plaintiff Goltra. The judgment of the Supreme Court in effect was that inasmuch as the record showed that the contract had been in fact canceled by the Chief of Engineers, it would be a futile thing to re-

turn the fleet to Goltra and then Goltra turn it back to the Government. The holding of the Supreme Court is that there must be good faith in the exercise of the judgment of the lessor in declaring and effecting the cancelation, and recites that there is nothing in the nature of lack of good faith shown; that the right of the lessor to take over the fleet under the forfeiture provision of the contract is clear "unless there was fraud in the judgment of termination by the Chief of Engineers, the lessor, of which we have found no evidence." It is thus clear that the judgment of the Supreme Court was based upon the bona fides of this letter of the Chief of Engineers and its having been written by him in the exercise of his judgment. (*Goltra* v. *Weeks, Secretary of War*, 271 U. S. 536.)

As this letter was excluded by the trial court when offered in evidence, there was no occasion or opportunity for Goltra then to show the facts as to its execution.

Since the rendition of the judgment in the Supreme Court the Chief of Engineers under oath by deposition in an action in the Supreme Court of the District of Columbia testified that he had not written the letter, and did not know who was the author of it; that the letter was laid on his desk for signature; that he protested against signing it; that he had no information as to the subject matter of the letter; that the Army officer under him located at St. Louis where the fleet had headquarters and whose duty it was to report to the Chief of Engineers as to any breach or violation of the terms of the contract by Goltra, had not reported any such violation or breach; that he, the Chief of Engineers, was advised that the signing of the letter by him was compulsory, being a military order from his superior officer, and that he signed it, not in the exercise of his judgment, but because he was ordered so to do by the Secretary of War.

The Supreme Court very naturally and properly took it for granted that this letter-notice of cancelation was bona fide and everything it purported on its face to be.

The Supreme Court had no reason, even remotely, to infer or suspect that this letter was not in truth and fact an expression of the Chief of Engineers' judgment formed and expressed in such manner as to constitute a proper cancelation under the contract.

The logical effect of assuming the bona fides of th letter was to dispose of the case upon its merits. The fil show that the Solicitor General and the attorneys on both sides of the case understood the proceedings were merely interlocutory—a question of the issuance of a temporary injunction, and the principally contested issue one of jurisdiction. When the mandate of the Supreme Court reversing the case reached the trial court, that court in sustaining a motion to dismiss an amended petition, said:

"If I can still read English (and I am dominated by an hallucination that I can), the Supreme Court clearly decided the merits of this case on the appeal from this Court, from the order by this Court granting a temporary injunction. No language can be plainer upon that point than the language used by the Supreme Court itself. Whether it intended to do it or not; whether under the case and facts before it, according to the ancient practice and procedure, it has a right to do it or not is outside of the question. Perhaps it did not intend to do so. But, nevertheless, it did so in plain and unmistakable language.

". . . It is true that I am now, and have always been, of the same impression that counsel for defendant seems to have been when he filed his brief, and of the impression held by counsel for plaintiff, that there has never been in this case any hearing whatever upon the merits. It was tried here upon the rule to show cause why a temporary injunction should not be granted. Incidentally, of course, as is always necessary in an application for a temporary injunction, some of the facts came up as evidentiary facts and were put forward as reasons why a temporary injunction should be granted. But never has there been a submission here on the merits; never has there been a trial on

the merits. There is not a minute, I venture to say, there is not a record, I venture to say, in all the records of this Court, in this case, that shows a submission of this case upon its merits, or a trial of it upon its merits. Clearly, the Supreme Court by its opinion cleaned up everything there is in this case. I repeat, it may not have intended to do so, but it just as effectually did it as if it had intended to do it. I am bound by what it says. In effect, it had before it the same bill that I had before me; that is to say, a bill for a temporary injunction, and upon final hearing on the merits a bill asking for a perpetual injunction. That is exactly what is here."

It is thus obvious that Goltra's claims have never been presented to or heard by any court upon their merits. The files show that Goltra has attempted to secure an adjudication of his claim both in the courts and before the Department since the rendition of the opinion in the Supreme Court, but that decision has effectually prevented any consideration of his claim.

From the investigation made it appears that Goltra has never had his day in court. He has exhausted all the ordinary means of obtaining a hearing. The Court of Claims is the only forum in which he can now be heard, and the passage of this bill is the only method by which he can enter that forum.

Respectfully,

HOMER S. CUMMINGS,
Attorney General.

The Committee on the Judiciary reported a similar bill in the Seventy-second Congress. The committee report, which explains the circumstances under which Mr. Goltra's claims arise, is attached hereto and made a part of this report, as follows:

[House Report No. 1426, Seventy-second Congress, first session]

The Committee on the Judiciary, to whom was referred the bill (H.R. 6425) conferring jurisdiction upon the Court of Claims of the United States to hear, consider, and render judgment on the claims of Edward F. Goltra against the United States arising out of the taking of certain vessels and unloading apparatus, having considered the same, reports favorably thereon with amendments and recommends that the bill as amended do pass.

The committee amendments are as follows:

Page 2, line 2, strike out "tortously" and insert in lieu thereof the word "tortiously".

Page 2, line 8, after the word "appeal" insert the following words: "as of right".

It appears from the information furnished the committee that the claim of Edward F. Goltra has never been tried upon the merits. The trial judge, in dismissing the complaint after the decision of the Supreme Court, hereinafter referred to, said:

"It is true that I am now, and have always been, of the same impression that counsel for defendant seems to have been when he filed his brief, and of the impression held by counsel for plaintiff, that there has never been in this case any hearing whatever upon the merits. It was tried here upon the rule to show cause why a temporary injunction should not be granted. Incidentally, of course, as is always necessary in an application for temporary injunction, some of the facts came up as evidentiary facts and were put forward as reasons why a temporary injunction should be granted. But never has there been a submission here on the merits; never has there been a trial on the merits. There is not a minute, I venture to say; there is not a record, I venture to say, in all the records of this court, in this case, that shows a submission of this case upon its merits, or a trial of it upon its merits."

An appeal from an order granting a preliminary injunction was carried to the Supreme Court of the United States

and that Court not only reversed the order granting the preliminary injunction, but directed judgment absolute against the plaintiff, Edward F. Goltra. It is clear that the Court was led to this action by reason of the inclusion in the record of appeal of a letter from Maj. Gen. Lansing H. Beach, Chief of Engineers of the War Department at the time, who was lessor under the terms of the lease, stating that in his judgment (the Chief Engineer's), Goltra had failed to carry out the terms of his lease.

Section 8 of the contract of lease provided as follows:

"The lessor reserves the right to inspect the plant, fleet, and work, at any time to see that all the said terms and conditions of this lease are fulfilled, and that the crews and other employees are promptly paid, monthly or oftener; and non-compliance, in his judgment, with any of the terms or conditions will justify his terminating the lease and returning the plant and said barges and towboats to the lessor, and all moneys in the Treasury or in bank to the credit of the Secretary of War shall be deemed rentals earned by and due to the lessor for the use of said vessels."

The opinion of the Supreme Court given by Mr. Chief Justice Taft at the close stated (*Goltra* v. *Weeks*, 271 U. S. 536, 550):

"The right of the lessor to take over the fleet under section 8 of the contract, unless there was fraud in the judgment of termination by the Chief of Engineers, the lessor, of which we have found no evidence, is clear. We think, therefore, the injunction should be dissolved and the fleet restored to the lessor."

There was, of course, no reason for the court to suppose that the letter of General Beach declaring that in his judgment Goltra had not complied with the terms of the lease, was not bona fide and entitled to full credence. It appears, however, from the sworn testimony of General Beach subsequently taken in aid of Goltra's claim on the 14th of November, 1929, that General Beach did not exer-

cise his judgment in the matter, never made any investigation of the facts to determine the accuracy or inaccuracy of the statement that Goltra had or had not complied with the terms of his lease and signed the letter in question, used upon the hearing for a preliminary injunction, pursuant to the instructions of the War Department which he was advised by counsel representing the Department was a military order with which he was obliged to comply, irrespective of the fact that he himself had arrived at no conclusion whatsoever in the matter and despite the fact that he himself protested against signing such a letter, not written by him and not expressing his own views.

It further appears that from the time the fleet was turned over to Goltra and during the period of his possession of the same the Chief of Engineers, the lessor, was represented in the St. Louis district by Maj. Lundsford E. Oliver, upon whom developed the duty of observer for the Department, charged, among other things, with seeing that the terms of the lease were complied with by Goltra. Major Oliver was never called upon to give his testimony, although it would appear that he was in the best position of anyone in the Government service to testify with respect to the performance or nonperformance by Goltra of the terms of the lease.

We are advised that one of the Members of the House, Hon. Henry T. Rainey, of Illinois, wrote Major Oliver requesting an answer to the following questions:

"1. Were you the engineer officer at St. Louis, Mo., charged with seeing that Edward F. Goltra complied with the terms of a certain contract he had for the lease of 19 Government barges and 4 Government towboats?

"2. Did you make delivery to him of the aforesaid barges and boats?

"3. Were you continuously at your post during his operation of the same?

"4. Did he operate said boats and barges in compliance with the terms of his contract so far as the limitations placed on him by the Secretary of War permitted?"

to which Major Oliver replied under date of April 7, 1932:

"Answering your questions in order:

"1. I was the engineer officer at St. Louis, Mo., charged with seeing that Edward F. Goltra complied with the terms of a certain contract he had for the lease of 19 Government barges and 4 Government towboats.

"2. I made delivery to him of the aforesaid barges and boats. Among other duties, I made an inspection of the fleet each month after delivery had been made in order to see that Mr. Goltra kept the said fleet in good condition.

"3. I was continuously at my post during the time that Mr. Goltra had possession of the fleet. I may have been away on a leave of absence for as much as a week or so at some time during this period, but, if so, no one relieved me of my duties during such period.

"4. In my opinion Mr. Goltra operated the said boats and barges in compliance wi. . . e terms of his contract so far as the limitations placed on him by the Secretary of War permitted."

Immediately after the termination of the litigation in the action for an injunction, Goltra, upon the advice of his St. Louis counsel, commenced an action for damages in the district court for the District of Columbia against the Inland Waterways Corporation, a corporation created by act of Congress to take over the inland waterways activities of the Government, including the towboats and barges leased to Goltra. The circuit court of appeals held (*Goltra* v. *Inland Waterways Corporation,* 49 Fed. (2d) 497) that no action lay against such corporation. In the meantime it would appear that the statute of limitation had run against Goltra, thus barring the commencement of an ac-

tion against the United States in the Court of Claims. The rules of the Court of Claims forbid the pendency of any other suit for the same relief, so Goltra was precluded from commencing both an action in the Court of Claims against the United States and an action in the district court against the Inland Waterways Corporation.

Upon the foregoing facts we have reached the conclusion that Goltra has never had his day in court with respect to his claims, to which he is in justice entitled, and your committee therefore recommends the enactment of the proposed bill.

CALENDAR NO. 392

73D CONGRESS
2d Session

REPORT
No. 362

SENATE

CONFERRING JURISDICTION ON THE COURT OF CLAIMS TO CONSIDER AND DISPOSE OF CERTAIN CLAIMS OF EDWARD F. GOLTRA.

FEBRUARY 20 (calendar day FEBRUARY 26), 1934.—Ordered to be printed

Mr. STEPHENS, from the Committee on the Judiciary submitted the following

REPORT

[To accompany S. 1091]

The Committee on the Judiciary, having had under consideration the bill (S. 1091) conferring jurisdiction upon the Court of Claims of the United States to hear, consider, and render judgment on the claims of Edward F. Goltra against the United States arising out of the taking of certain vessels and unloading apparatus, reports the same favorably to the Senate and recommends that the bill do pass.

The purpose and propriety of this legislation are fully set out in the following letter from the Attorney General to the chairman of this committee:

JUSTICE DEPARTMENT,
Washington, D. C., January 20, 1934.

Hon. HENRY F. ASHURST,
Chairman Committee on the Judiciary,
United States Senate, Washington, D.C.

DEAR SENATOR ASHURST: In reply to your letter of June 16, 1933, requesting a report and recommendation with reference to S. 1091, Seventy-third Congress, first session, conferring jurisdiction upon the Court of Claims of the United States to hear, consider, and render judgment on the claims of Edward F. Goltra against the United States arising out of the taking of certain vessels and unloading apparatus, I beg to advise that I have caused the records and files of this Department to be examined and find from such examination:

[The body of this letter is identical with that addressed to Hon. Hatton W. Sumners printed above pp. ii-vi].

For your further information I am attaching hereto photostat copies of deposition of Maj. Gen. Lansing H. Beach, taken in a case then pending in the Supreme Court of the District of Columbia, and of statement of Maj. Lunsford E. Oliver, before the House of Representatives Special Committee to Investigate Government Competition With Private Enterprises; together with copy of four questions asked of Major Oliver by Hon. Henry T. Rainey, of Illinois, and the replies thereto made by Major Oliver.

Respectfully,

HOMER S. CUMMINGS,
Attorney General.

[Here follow the questions propounded by Hon. Henry T. Rainey and the answers of Major Oliver, printed above pp. ix-x].

APPENDIX B

First Cause of Action

First Calculation

1 Period of Lease (1)	2 Net Rental Value Barges (2)	3 Net Rental Value Towboats (3)	4 Total Net Rental Value of Fleet (4)
March 25, 1923—July 14, 1923.	$229,100.67	$108,566.88	$ 337,667.55
July 15, 1923—July 14, 1924.	753,350.00	357,000.00	1,110,350.00
July 15, 1924—July 14, 1925.	753,350.00	357,000.00	1,110,350.00
July 15, 1925—July 14, 1926.	753,350.00	357,000.00	1,110,350.00
July 15, 1926—July 14, 1927.	753,350.00	357,000.00	1,110,350.00

Total productive value of fleet from date of seizure to end of lease period.... $4,779,067.55

Second Calculation

Total net rental during unexpired period of lease as calculated above in this appendix.....		$4,779,067.55	
To be paid to credit of Secretary of War as purchase price of fleet (principal) (see contract provisions, R. 17-19, and R. 66-67)	$3,590,000.00		
Accrued interest from delivery date of fleet, July 15, 1922, to date of full payment—approximately 4 years from delivery date (5)	441,158.00		
Total payments to Secretary of War.....		4,031,158.00	
Net rental after payment of principal and interest for purchase of fleet....			$ 747,909.55
Depreciated value of fleet which would belong to plaintiff after above payments (6) (R. 17-19)			3,231,000.00

(1) By terms of contract, the lease was to run five years (disregarding the option) from the date of delivery of the equipment to plaintiff (R. 16), which was all delivered on July 15, 1922 (Finding 15, R. 34).

(2) The annual net rental value of the 19 barges is calculated on the basis of $\frac{1}{10}$ of 1% per day (R. 66, 67, 68-72) of cost of barges (R. 66) multiplied by 365 days less the cost of annual heavy overhaul (R. 68). The formula is as follows: \$110,000 (cost per barge) × 19 (number of barges) × $\frac{1}{10}$ of 1% (percentage of cost) × 365 (days) — \$9,500 (\$500 × 19 overhaul charge) = \$753,350. The daily net rental is \$753,350 ÷ 365 = \$2,063.97. The first figure in this column is the daily net rental of 19 barges for 111 days (from seizure on March 25, 1923, through July 14, 1923, *i.e.*, \$2,063.97 × 111).

(3) The annual net rental value of the 4 towboats is calculated on the basis of $\frac{1}{15}$ of 1% per day (R. 66, 67, 68-72) of cost of towboats (R. 66) multiplied by 365 days less the cost of annual heavy overhaul (R. 68). The formula is as follows: \$375,000 (cost per towboat) × 4 (number of towboats) × $\frac{1}{15}$ of 1% (percentage of cost) × 365 (days) — \$8,000 (\$2,000 × 4 overhaul charge) = \$357,000. The daily net rental is \$357,000 ÷ 365 = \$978.08. The first figure in this column is the daily net rental of 4 towboats for 111 days (from seizure on March 25, 1923, through July 4, 1923, *i.e.*, \$978.08 × 111).

(4) This column is an addition of figures in Columns 2 and 3.

(5) The contract provided for payment of accrued interest from date of delivery of fleet on unpaid portions of purchase price (R. 17-19). On the basis of rental value, the cost of the fleet and interest would all be repaid no later than approximately July 15, 1926. Interest at 4% on the entire principal sum of \$3,590,000 is included in the interest figure for the first two years of this period. Thereafter the interest figure includes 4% only on the unpaid balance of the purchase price.

(6) At the date of seizure, the fleet had a remaining useful life of thirty years (R. 73); the yearly depreciation would therefore be 3.33%. On the basis of above rental figures it would take about three years from date of seizure to deposit a sum sufficient to pay for the fleet (R. 17-19). Depreciation for this period would be 10% or \$359,000, leaving a value after depreciation of \$3,231,000 (\$3,590,000 less \$359,000).

APPENDIX C

First Cause of Action

1	2 Net Rental Value Barges (1)	3 Net Rental Value Towboats (2)	4 Total Net Rental Value of Fleet (3)	
Reconstruction of fleet would have taken at least two years after letting of contracts (R. 66, 67); net rental value for each year would be.....	$753,350.00	$357,000.00	$1,110,350.00	
	753,350.00	357,000.00	1,110,350.00	
Total net rental value of fleet during time necessary to replace it.....				$2,220,700.00
To acquire capital to reconstruct fleet on basis of repayment in fifteen equal annual installments similar to payment terms of contract with defendant (R. 19), plaintiff would have had to pay interest of at least 6.138 per cent. on unpaid installments (R. 74) as against 4 per cent. under contract with defendant (R. 19). This difference in rate of 2.138 per cent. on paid installments over the fifteen-year period would be (4).....				614,033.59
TOTAL				$2,834,733.59

(1) The annual net rental value of the 19 barges is calculated on the basis of 4/10 of 1% per day (R. 66, 67, 68-72) of cost of barges (R. 66) multiplied by 365 days.

68). The formula is as follows:

$110,000 (cost per barge) × 19 (number of barges) × 1/10 of 1% (percentage of cost) × 365 (days) — $9,500 ($500 × 19 overhaul charge) = $753,350.

The daily net rental is $753,350 ÷ 365 = $2,063.97. The figures in this column are the annual net rental of the charges for two annual periods and for one sixty day period, the latter arrived at by multiplying the daily net rental of $2,063.97 by 60.

(2) The annual net rental value of the 4 towboats is calculated on the basis of 1/15 of 1% per day (R. 66, 67, 68-72) of cost of towboats (R. 66) multiplied by 365 days less the cost of annual heavy overhaul (R. 68). The formula is as follows:

$375,000 (cost of towboat) × 4 (number of towboats) × 1/15 of 1% (percentage of cost) × 365 (days) — $8,000 ($2,000 × 4 overhaul charge) = $357,000.

The daily net rental is $357,000 ÷ 365 = $978.08. The figures in this column are the annual net rental of the towboats for two annual periods and for one sixty day period, the latter arrived at by multiplying the daily net rental of $978.08 by 60.

(3) This column is an addition of figures in the two preceding columns.

(4) This sum is calculated as follows:

1st year	$3,590,000.00	×	.02138	equals	$76,754.20
2nd "	3,350,666.67	×	.02138	"	71,637.25
3rd "	3,111,333.33	×	.02138	"	66,520.30
4th "	2,872,000.00	×	.02138	"	61,403.36
5th "	2,632,666.67	×	.02138	"	56,286.41
6th "	2,393,333.33	×	.02138	"	51,169.47
7th "	2,154,000.00	×	.02138	"	46,052.52
8th "	1,914,666.67	×	.02138	"	40,935.57
9th "	1,675,333.33	×	.02138	"	35,818.63
10th "	1,436,000.00	×	.02138	"	30,701.68
11th "	1,196,666.67	×	.02138	"	25,584.73
12th "	957,333.33	×	.02138	"	20,467.79
13th "	718,000.00	×	.02138	"	15,350.84
14th "	478,666.67	×	.02138	"	10,233.89
15th "	239,333.33	×	.02138	"	5,116.95
	$28,719,999.50				$614,033.59

APPENDIX D

First Cause of Action

Year Ended March 25	Net Rental of Barges (2)	Net Rental of Towboats (3)	Total Net Rental	Principal Payments to Defendant Under Contract (4)	Interest Payments to Defendant Under Contract (5)	Total Payments to Defendant Under Contract	Annual Net Return to Plaintiff
1924 (1)	$753,350.00	$357,000.00	$ 1,110,350.00	$239,333.33	$ 143,600.00	$382,933.33	$727,416.67
1925	753,350.00	357,000.00	1,110,350.00	239,333.33	134,026.66	373,359.99	736,990.01
1926	753,350.00	357,000.00	1,110,350.00	239,333.33	124,453.33	363,786.66	746,563.34
1927	753,350.00	357,000.00	1,110,350.00	239,333.33	114,880.00	354,213.33	756,136.67
1928	753,350.00	357,000.00	1,110,350.00	239,333.33	105,306.66	344,639.99	765,710.01
1929	753,350.00	357,000.00	1,110,350.00	239,333.33	95,733.33	335,066.66	775,283.34
1930	753,350.00	357,000.00	1,110,350.00	239,333.33	86,160.00	325,493.33	784,856.67
1931	753,350.00	357,000.00	1,110,350.00	239,333.33	76,586.66	315,919.99	794,430.01
1932	753,350.00	357,000.00	1,110,350.00	239,333.33	67,013.33	306,346.66	804,003.34
1933	753,350.00	357,000.00	1,110,350.00	239,333.33	57,440.00	296,773.33	813,576.67
1934	753,350.00	357,000.00	1,110,350.00	239,333.33	47,866.66	287,199.99	823,150.01
1935	753,350.00	357,000.00	1,110,350.00	239,333.33	38,293.33	277,626.66	832,723.34
1936	753,350.00	357,000.00	1,110,350.00	239,333.33	28,720.00	268,053.33	842,296.67
1937	753,350.00	357,000.00	1,110,350.00	239,333.33	19,146.66	258,479.99	851,870.01
1938	753,350.00	357,000.00	1,110,350.00	239,333.33	9,573.33	248,906.66	861,443.34
			$16,655,250.00		$1,148,799.95		

Total net return to plaintiff of which he was deprived by reason of defendant's acts $11,916,456.05

Depreciation of fleet costing $3,590,000 (R. 66) from January 1, 1923, to December 31, 1937, assuming useful life of 30 years (R. 73) would be 50% $1,795,000.00

Cost of fleet	$3,590,000.00
Depreciation for 15 years	1,795,000.00

(1) Each year taken on basis of 365 days.

(2) The annual net rental value of the 19 barges is calculated on the basis of 1/10 of 1% per day (R. 66, 67, 68-72) of cost of barges (R. 66) multiplied by 365 days less the cost of annual heavy overhaul (R. 68). The formula is as follows: $110,000 (cost per barge) × 19 (number of barges) × 1/10 of 1% (percentage of cost) × 365 (days) — $9,500 ($500 × 19 overhaul charge) = $753,350. The daily net rental is $753,350 ÷ 365 = $2,063.97.

(3) The annual net rental value of the 4 towboats is calculated on the basis of 1/15 of 1% per day (R. 66, 67, 68-72) of cost of towboats (R. 66) multiplied by 365 days less the cost of annual heavy overhaul (R. 68). The formula is as follows: $375,000 (cost per towboat) × 4 (number of towboats) × 1/15 of 1% (percentage of cost) × 365 (days) — $8,000 ($2,000 × 4 overhaul charge) = $357,000. The daily net rental is $357,000 ÷ 365 = $978.08.

(4) Calculated on requirement in original contract of 15 equal annual payments by plaintiff to defendant (R. 19).

(5) Calculated on requirement in original contract of interest of 4% per annum on all unpaid portions of purchase price (R. 19).

APPENDIX E

Second Cause of Action
First Calculation

Period of Lease (1)	Rental of Unloading Crane (2)	Rental of Land and Runways (3)	Total Rental (4)
March 25, 1923—July 14, 1923.....	$ 7,602.39	$1,824.84	$ 9,427.23
July 15, 1923—July 14, 1924.....	25,000.00	6,000.00	31,000.00
July 15, 1924—July 14, 1925.....	25,000.00	6,000.00	31,000.00
July 15, 1925—July 14, 1926.....	25,000.00	6,000.00	31,000.00
July 15, 1926—July 14, 1927.....	25,000.00	6,000.00	31,000.00

Total productive value of unloading crane, land and runways from date of seizure to end of lease period.....		$133,427.23
Rental of plaintiff's land and runways on which unloading crane was left by defendant at rate of $6,000 per year from July 15, 1927, to date (April 14, 1939, taken for convenience) eleven years, nine months.....		70,500.00
EXPENDITURES:		
Cost of runways (Finding 50, R. 46).....	$36,061.49	
Wages of watchmen to watch defendant's unloading facilities on plaintiff's runways from July, 1926, to date (April 14, 1939, taken for convenience), 153 months at $250 per month (R. 66, 68).....	38,250.00	74,311.49
Total (5).....		$278,238.72

(1) By the terms of the contract, including the supplemental contract, the lease with reference to the fleet and the unloading facilities was to run five years (disregarding the option) from the date of delivery of the equipment to plaintiff (R. 16, 22). The equipment was all delivered on July 15, 1922 (Finding 15, R. 34).

(2) The rental of the unloading crane was $25,000 per year (R. 66, 67). The first figure in this column is the daily rental of the unloading crane for 111 days (from seizure on March 25, 1923, through July 14, 1923, *i.e.*, $68.49 × 111).

(3) The rental of land and runways was $6,000 per year (Finding 51, R. 46). The first figure in this column is the daily rental of the land and runways for 111 days (from seizure on March 25, 1923, through July 14, 1923, *i.e.*, $16.44 × 111).

(4) This column is an addition of the figures in the preceding two columns.

(5) Interest should be allowed on the rental value from the end of each respective year of rental. Interest should be allowed on the expenditure of $36,061.49 from the date of seizure, March 25, 1923. With respect to the $38,250, interest should be allowed from the end of each respective calendar year with reference to the watchmen's wages paid out in the course of that year.

APPENDIX F

Second Cause of Action

Second Calculation

Year Ended March 25	Rental Unloading Crane (2)	Rental Land and Runways (3)	Total Rental	Principal Payments to Defendant Under Contract (4)	Interest Payments to Defendant Under Contract (5)	Total Payments to Defendant Under Contract	Annual Net Return to Plaintiff
1924 (1)	$25,000.00	$6,000.00	$31,000.00	$14,000.00	$8,400.00	$22,400.00	$ 8,600.00
1925	25,000.00	6,000.00	31,000.00	14,000.00	7,840.00	21,840.00	9,160.00
1926	25,000.00	6,000.00	31,000.00	14,000.00	7,280.00	21,280.00	9,720.00
1927	25,000.00	6,000.00	31,000.00	14,000.00	6,720.00	20,720.00	10,280.00
1928	25,000.00	6,000.00	31,000.00	14,000.00	6,160.00	20,160.00	10,840.00
1929	25,000.00	6,000.00	31,000.00	14,000.00	5,600.00	19,600.00	11,400.00
1930	25,000.00	6,000.00	31,000.00	14,000.00	5,040.00	19,040.00	11,960.00
1931	25,000.00	6,000.00	31,000.00	14,000.00	4,480.00	18,480.00	12,520.00
1932	25,000.00	6,000.00	31,000.00	14,000.00	3,920.00	17,920.00	13,080.00
1933	25,000.00	6,000.00	31,000.00	14,000.00	3,360.00	17,360.00	13,640.00
1934	25,000.00	6,000.00	31,000.00	14,000.00	2,800.00	16,800.00	14,200.00
1935	25,000.00	6,000.00	31,000.00	14,000.00	2,240.00	16,240.00	14,760.00
1936	25,000.00	6,000.00	31,000.00	14,000.00	1,680.00	15,680.00	15,320.00
1937	25,000.00	6,000.00	31,000.00	14,000.00	1,120.00	15,120.00	15,880.00
1938	25,000.00	6,000.00	31,000.00	14,000.00	560.00	14,560.00	16,440.00

Total net return to plaintiff of which he was deprived by reason of defendant's acts..... $187,800.00

Depreciation of unloading crane costing $210,000 (R. 66, 67)

life of 20 years would be 75%	$157,500.00	
Cost of unloading crane	$210,000.00	
Depreciation for 15 years	157,500.00	
Value of unloading crane December 31, 1937		52,500.00
		$240,300.00
EXPENDITURES:		
Cost of runways (Finding 50, R. 46)	$36,061.49	
Wages of watchmen to watch defendant's unloading facilities on plaintiff's Runways from July, 1926 to date (April 14, 1939, taken for convenience), 153 months at $250 per month (R. 66, 68)	38,250.00	
Total Expenditures		74,311.49
TOTAL ON WHICH RECOVERY OF JUST COMPENSATION UNDER SECOND CAUSE OF ACTION SHOULD BE BASED		$314,611.00

(1) Each year taken on basis of 365 days.

(2) The rental of the unloading crane was $25,000 per year (R. 66, 67). The first figure in this column is the daily rental of the unloading crane for 281 days (from seizure on March 25, 1923, through December 31, 1923, *i.e.*, $68.49 × 281).

(3) Then rental of land and runways was $6,000 per year (Finding 51, R. 46). The first figure in this column is the daily rental of the land and runways for 281 days (from seizure on March 25, 1923, through December 31, 1923, *i.e.*, $16.44 × 281).

(4) Calculated on requirement in original contract of 15 equal annual payments by plaintiff to defendant (R. 19) made applicable to unloading crane (R. 22).

(5) Calculated on requirement in original contract of interest of 4 per cent. per annum on all unpaid portions of purchase price made applicable to unloading crane (R. 22).

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CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM 1940

No. 191

THE UNITED STATES,

Appellant,

vs.

KATE B. GOLTRA and E. FIELD GOLTRA, JR., Executors of the Estate of Edward F. Goltra, deceased,

Appellees.

No. 192

KATE B. GOLTRA and E. FIELD GOLTRA, JR., Executors of the Estate of Edward F. Goltra,

Cross-Appellants,

against

THE UNITED STATES,

Cross-Appellee.

ON APPEAL AND CROSS APPEAL FROM THE UNITED STATES COURT OF CLAIMS

REPLY BRIEF OF APPELLEES-CROSS-APPELLANTS

RICHARD E. DWIGHT,
HERMAN J. GALLOWAY,
JOHN F. CASKEY,
FREDERICK W. P. LORENZEN,
Counsel for Appellees-Cross-Appellants.

January 3, 1941

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TABLE OF CONTENTS

	PAGE
Preliminary Statement	1
I. Just compensation for all the property rights taken from Goltra must be based upon the value of all the interrelated rights and not upon the value of each separately	3
II. In valuing the property rights taken, the objective rental value of the fleet must be considered	6
III. There can be no question as to the credibility of the evidence on rental value	14
IV. The interest differential must be considered	15
V. The same elements must be considered under the second cause of action	17
VI. The award of the Court of Claims was wholly inadequate	18
CONCLUSION	19

TABLE OF AUTHORITIES

	PAGE
Anderson v. *Hilton & Dodge Co.*, 121 Ga. 688	17
Anvil Mining Company v. *Humble*, 153 U. S. 540	12
Banta v. *Stamford Motor Co.*, 89 Conn. 51	8
Bothwell v. *United States*, 254 U. S. 231	3
Boyle v. *Reeder*, 23 N. C. 607	8
Brooks-Scanlon Corp. v. *United States*, 265 U. S. 106	3
Ches. & Ohio Ry. v. *Kelly*, 241 U. S. 485	16
Cocke v. *Edwards*, 215 Ala. 8	8
The Conqueror, 166 U. S. 110	15
De Laval Co. v. *United States*, 284 U. S. 61	6
Dettmar v. *Burns Bros.*, 111 Misc. 189, N. Y. App. Term (2nd Dept.)	8
Doddridge v. *American Trust & Savings Bank*, 98 Ind. App. 334	17
Farabee-Treadwell Co. v. *Bank & Trust Co.*, 135 Tenn. 208	17
Gas Co. v. *Glass Co.*, 56 Kan. 614	9
Griffin v. *Colver*, 16 N. Y. 489	8, 9
Harper Bros. v. *Klaw*, 232 Fed. 609	12, 13
Hedden v. *Schneblin*, 126 Mo. App. 478	17
Jackson v. *Innes*, 231 Mass. 558	7
Joslin Co. v. *Providence*, 262 U. S. 668	3
Kirke La Shelle Co. v. *Armstrong Co.*, 263 N. Y. 79	12
The Lagonda, 44 Fed. 367	8
Louis Leavitt v. *United States*, 60 C. Cls. 952	12

PAGE

Manners v. *Morosco*, 252 U. S. 317 12-13
Meyers v. *Bradford*, 54 Cal. App. 157 8
Mitchell v. *United States*, 267 U. S. 341 3
Monongahela Navigat'n Co. v. *United States*, 148 U. S. 312 3

Naughton Mulgrew Co. v. *Westchester F. Co.*, 105 Misc. 595, N. Y. App. Term (1st Dept.) 8

Patterson v. *Meyerhofer*, 204 N. Y. 96 12

Rapp v. *Mabbett Motor Car Co., Inc.*, 201 App. Div. 283 8

Shurtleff v. *Occidental B. & L. Ass'n.*, 105 Neb. 557 17

United States v. *Peck*, 102 U. S. 64 12

Williamson et al. v. *Barrett et al.*, 13 How. 101 8
Witherbee v. *Meyer*, 155 N. Y. 446 8

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27 Columbia Law Review 98 7

39 Harvard Law Review 760 7

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IN THE

Supreme Court of the United States

OCTOBER TERM 1940

No. 191

THE UNITED STATES,
Appellant,
against

KATE B. GOLTRA and E. FIELD GOLTRA, Jr., Executors of the Estate of Edward F. Goltra, deceased,
Appellees.

No. 192

KATE B. GOLTRA and E. FIELD GOLTRA, Jr., Executors of the Estate of Edward F. Goltra,
Cross-Appellants,
against

THE UNITED STATES,
Cross-Appellee.

ON APPEAL AND CROSS APPEAL FROM THE UNITED STATES COURT OF CLAIMS

REPLY BRIEF OF APPELLEES-CROSS-APPELLANTS

PRELIMINARY STATEMENT

The argument as to interest made by the Government in support of its appeal has been fully treated in our Main

Brief. That argument consists of an admittedly unsuccessful effort to rationalize two lines of authorities, both of which have been rendered wholly immaterial by the fact that there is here a special jurisdictional act under which this action has been brought.

In our Main Brief we have fully anticipated the Government's chief arguments as to the admissibility of the offer made by Standard Oil Company of Louisiana to rent the Goltra fleet (cf. Plff.'s Main Br., pp. 28-35, and Gov. Br., pp. 70-72). The statement (Gov. Br., p. 71) that the Standard Oil Company knew when it made the offer that the litigation prevented acceptance by Goltra must have been inadvertently made. The statement is unsupported by any record citation, is directly contrary to the record made in the Court of Claims and contrary to the stipulation here that the offer was made in good faith (R. 66-67). The Government's reference (Gov. Br., p. 72) to the statute (28 U. S. C. 269) providing that the Court of Claims may consider questions "whether exceptions were or were not taken" before the Commissioner, does not touch our point that the Court of Claims' Rules and the common law of evidence require objections when evidence is offered if the evidence is deemed incompetent (Main Br., pp. 33-34). Exceptions are not necessary; objections are essential to raise the point.

In this reply brief we answer only the contentions made by the Government in support of the decision below excluding from consideration the rental or productive value of the fleet and unloading apparatus, the interest differential and certain miscellaneous factors all of which should have been considered in making the award for just compensation.

I

JUST COMPENSATION FOR ALL THE PROPERTY RIGHTS TAKEN FROM GOLTRA MUST BE BASED UPON THE VALUE OF ALL THE INTERRELATED RIGHTS AND NOT UPON THE VALUE OF EACH SEPARATELY.

The Government seems to make no argument that the seizure of the fleet was not likewise a seizure of Goltra's contract rights which were dependent upon his possession of the fleet. The decisions in *Brooks-Scanlon Corp.* v. *United States,* 265 U. S. 106, and *Monongahela Navigat'n Co.* v. *United States,* 148 U. S. 312, require a consideration of the productive value of the fleet in the light of the contract under which the fleet was held; the contract rights were as much property as the fleet itself (see Plff.'s Main Br., pp. 18-22).

This case is wholly unlike *Mitchell* v. *United States,* 267 U. S. 341, *Joslin Co.* v. *Providence,* 262 U. S. 668, and *Bothwell* v. *United States,* 254 U. S. 231, referred to in the Government's brief (p. 68). Those cases stand for the general proposition that where the Government by power of eminent domain takes land, it takes such land only and does not take the business conducted thereon. The business in fact is not taken. It may continue elsewhere. Whatever peculiar value the land may have to the business conducted thereon is taken into consideration in determining the value of the land. But in our case the taking of the fleet necessarily took also every contract right which Goltra had in connection therewith. As the taking of the lock and dam in the *Monongahela Navigation Company* case was held necessarily to take the rights conferred by

the State franchise, so here the seizure of the fleet necessarily took the contract rights. Furthermore, unlike the situation in the cases cited by the Government, the special jurisdictional act in our case provides for just compensation not only as to the taking of the fleet and the unloading apparatus, but "other legal or equitable claims arising out of the transactions in connection therewith" (R. 14).

The principal argument by the Government concedes the taking of contract rights, but seeks to show that such rights had no value. The argument is an effort to break apart the sum total of property rights taken from Goltra and destroy the value of each separately.

Thus, it is urged that the rental or productive value of the fleet should not be considered because under the terms of the contract all net earnings of the fleet, during the time before the option to purchase was exercised, were payable as rental (Gov. Br., pp. 59-60). This argument, as the Government recognizes (Gov. Br., p. 60), avoids the terms of the contract which provided that the rental so paid should be credited to Goltra toward the purchase price of the fleet when the option was exercised (R. 17-19). In the light of definite proof as to the fleets' rental value (R. 66-72) this provision of the contract can not be disregarded on the Government's theory that under the lease Goltra might not have earned anything through using the fleet (Gov. Br., p. 60). This is discussed fully below.

Subsequently, the Government, dexterously shifting its basis of argument, contends (Gov. Br., pp. 64-66) that the rental value should not be considered because the right to purchase the fleet was at the appraised value; it is contended that the appraised value and market value of the fleet must have been identical and therefore Goltra lost nothing when

the opportunity to purchase the fleet was taken by the Government with the seizure of the fleet; from this the Government concludes that there was no value in the right to use and possess the fleet and by such use earn and pay the purchase price.

Finally, the Government views separately the provision permitting payment for the fleet in fifteen installments, with four per cent. interest on the deferred payments, and concludes that this contractual right standing alone is of no value (Gov. Br., pp. 72-77).

These arguments cannot obscure the fact that the seizure of the fleet and the consequent refusal to permit Goltra to exercise his option (Finding 42, R. 44-45) took from Goltra a very valuable sum total of rights. Without any down payment whatever (other than Goltra's surrender of claims against the Government [R. 15]), Goltra had the right to possess the fleet of nineteen large steel barges and four substantial towboats. He had the right to operate this fleet and to realize earnings therefrom. He had the right to buy the fleet. This right was not one merely to buy at market, but to buy at an appraised value without making any down payment whatever. The payments could be spread over a period of fifteen years, with four per cent. interest on the balance due. In so far as the net rental or use value of the fleet not only paid the installments but exceeded them, these rights had a most substantial value. Where, as here, the evidence shows that, by the acceptance of one offer to rent the fleet for five years, Goltra could have paid for the fleet out of its net rental and still had more than $1,500,000 left over (R. 66-68), it is not difficult to realize that the contract rights taken from

Goltra with the seizure of the fleet were valuable. Each right cannot be treated separately. The rights are interrelated and are embodied in one contract; just compensation for the taking of these rights must be made on the basis of all the rights together.

II

IN VALUING THE PROPERTY RIGHTS TAKEN, THE OBJECTIVE RENTAL VALUE OF THE FLEET MUST BE CONSIDERED.

The value to be placed on the rights taken from Goltra with the seizure of the fleet must depend largely upon the productive value of the fleet. It has never been our contention that such productive value is recoverable specifically (Plff.'s Main Br., p. 26). But it does not follow that the productive value is not to be considered at all. On the contrary, this Court has held, for example, that while anticipated profits may not be recovered as such, the profitable nature of a contract is an element to be taken into account in determining just compensation for the contract (*De Laval Co.* v. *United States,* 284 U. S. 61, 72). Our complaint is that the court below did not consider the productive value at all in determining the amount of just compensation for the rights taken.

This productive value, as we have urged in our Main Brief, is the rental value of the fleet (pp. 22-23). That is an objective value which has nothing to do with profits earned or anticipated. The Government, in its argument, fails to understand this rule. The error of the Government's contention that rental value is admissible in evidence

to measure the use value of a vessel only if commensurate profits from operation can also be proved, is well explained in a note in 39 Harvard Law Review 760, where comment is made on the early English view, and the American rule of objective rental value is stated. The note is in part as follows (pp. 761-762):

> "The theory of compensation for the objective value of the plaintiff's right of use, which is followed by most of the American authorities, seems to be the sounder. The value of a chattel lies in the value of the rights incident to its ownership. Thus an owner who is deprived of the use of his vessel has had taken from him one of such rights, and should recover the objective value of this right. The liability of the wrong-doer results from his putting it out of the power of the owner to use his vessel as he sees fit, and the fact that the owner would not actually have used it does not affect the value.
>
> * * * * * * * *
>
> "Accepting the theory of 'objective compensation,' the further question arises as to what evidence is admissible to determine this objective value. If the vessel had a market rental value, this would obviously be the best evidence of the value of its use and other evidence should be inadmissible."

The rule is similarly stated in 27 Columbia Law Review 98.

In *Jackson* v. *Innes,* 231 Mass. 558, the defendant "with force and arms took and carried away" plaintiff's boat and converted it to his own use. The court stated the measure of plaintiff's recovery as follows (pp. 560-561):

> "The plaintiff who is entitled to full compensation for all the injury suffered also can have damages for the loss of the use of the boat during the period

> of detention. *It is of no consequence that no income was derived from it.* The defendant who is a wrongdoer cannot avoid liability on that ground. * * * And evidence of the fair market rental value for the use of the boat was admissible on the question of damages." (Italics ours.)

For similar decisions see *The Lagonda,* 44 Fed. 367, 369 (E. D. N. Y.), and *Williamson et al.* v. *Barrett et al.,* 13 How. 101, 111-112. Many state court decisions have held that the use value of a chattel is determined by the rental value whether the chattel was used for profit purposes or otherwise. *Banta* v. *Stamford Motor Co.,* 89 Conn. 51, (discussion in connection with propriety of liquidated damages for delay in delivering a pleasure yacht); *Meyers* v. *Bradford,* 54 Cal. App. 157 (rental value for pleasure automobile); *Cocke* v. *Edwards,* 215 Ala. 8 (reasonable market use value for pleasure automobile); *Rapp* v. *Mabbett Motor Car Co., Inc.* 201 App. Div. 283, 287, N. Y. App. Div. (4th Dept.) (market use value for pleasure automobile); *Dettmar* v. *Burns Bros.,* 111 Misc. 189, N. Y. App. Term (2nd Dept.) (rental value for pleasure automobile); see also *Naughton Mulgrew Co.* v. *Westchester F. Co.,* 105 Misc. 595, N. Y. App. Term (1st Dept.) (holding that trial court had erred in determining that use value was to be calculated on the basis of average profits of taxicab instead of on the objective rental value).

The cases also hold that where prospective profits are too uncertain to furnish a basis for substantial recovery, the objective rental value may none the less be resorted to. *Griffin* v. *Colver,* 16 N. Y. 489, 492, 493, 497; *Witherbee* v. *Meyer,* 155 N. Y. 446, 449; *Boyle* v. *Reeder,* 23 N. C.

607, 614; *Gas Co.* v. *Glass Co.*, 56 Kan. 614, 625, In *Griffin* v. *Colver, supra,* the court in rejecting evidence as to anticipated profits and holding that recovery should be based upon rental value of machinery said (pp. 496-497):

> "The rent of a mill or other similar property, *the price which should be paid for the charter of a steamboat,* or the use of machinery, &c., &c., are not only susceptible of more exact and definite proof, but in a majority of cases would, I think, be found to be a more accurate measure of the damages actually sustained in the class of cases referred to, considering the contingencies and hazards attending the prosecution of most kinds of business, than any estimate of anticipated profits; * * *" (Italics ours.)

It is apparent, therefore, that the use or productive value which should be considered here is not prospective profits.

If the Government insists that the measure of recovery here is legal damages, the error in failing to consider the rental value is equally substantial. In that event, as the cases just cited show, rental value is recoverable specifically as the most certain measure of damage suffered by reason of the Government's action. The evidence of rental value in the present case is definite and certain; it relates specifically to the time of the seizure (R. 67-72). In an ordinary action at law the rental for the two years necessary to reconstruct the fleet (R. 67) would at least be allowed. This alone would have amounted to over $2,000,000 (Main Br., Appendix C). The stipulated appraisal value of the fleet certainly did not include, as the Government seems to intimate (Gov. Br., p. 67), the rental value during the time

of reconstruction. In an action at law in which use value became material, that value would be recoverable specifically quite apart from the value of the fleet.

The cases just discussed show that use value is measured by rental value not by prospective profits. The Government's statement that while Goltra operated the fleet he made no profits has no relevancy. In addition, Goltra's failure to realize profits was largely due to the action of the Government and aggravates rather than diminishes the wrong for which recovery is sought.

We take distinct issue with the argument that substantial profits could not have been realized by Goltra in operating the fleet under the terms of the lease if the conduct of the Secretary of War had been proper.

The restrictions in the lease did not themselves render Goltra's contract valueless. The inability on the part of Goltra to make profits was not due to the restrictions but to the unwarranted action of the Secretary of War in relation to these restrictions. The entire restrictive clause upon which the Government bases its argument is as follows (R. 16):

> "That the said lessee shall operate as a common carrier the said fleet of three or four towboats and nineteen barges upon the Mississippi River and its tributaries for the period of the lease and of any renewals thereof, transporting iron ore, coal and other commodities at rates not in excess of the prevailing rail tariffs, and not less than the prevailing rail tariffs without the consent of the Secretary of War; but nothing herein shall be deemed to prevent the most profitable and most advantageous use of said

vessels being made provided the Secretary of War consents to such use other than as a common carrier."

Initially the Secretary of War realized that under this clause he must at least permit Goltra to charge a rate which would enable him effectively to compete with railways (Finding 9, R. 32). Subsequently, however, when it became apparent that upon delivery of the fleet to Goltra his fleet would compete with the Government barge line, which had been established between the time when the original contract was entered into and the delivery date (cf. Finding 6, R. 31, and Finding 8, R. 31), the Secretary of War withdrew the permission theretofore given to Goltra to charge less than the rail rate and ultimately compelled him to charge the full rail rate on all cargo which could be carried in competition with the Government barge line (Findings 11, 12, 14, R. 33-34). This action was motivated by the Secretary of War's position that he "could not authorize or approve any operation on the lower Mississippi that would enter into competition with the established line of barges," and that any rate charged by Goltra must be agreed to by the Chief of the Government service "and the operators" of that line (Finding 11, R. 33).

The Government now seems to argue that the conduct just described would, to a large extent, prevent competition with rail carriers and so make it impossible for Goltra to realize profits (Gov. Br., pp. 61-62). The court below has stated that plaintiff's failure to make profits "can be well understood" (R. 54). One of the elements entering into such understanding was that "Plaintiff was prohibited from charging less than the rail rate" (R. 54). As to the failure

to make a profit during the period of operation under the injunction, the court below concluded "this was primarily due to the fact that all shippers on the Mississippi River realized that the fleet was tied up in litigation and possession was being sought through the courts by the defendant" (R. 54).

Whatever may have been the rights and powers of the Secretary of War under the clause of the original contract above set forth, the Secretary was certainly not within his legal rights in preventing operation of the Goltra fleet in competition with the subsequently established line of barges. The Government as a party to the original contract owed a duty to Goltra to refrain from using the power reserved to its officers for the destruction of the rights given to Goltra.[1] We are not dealing with the situation where the Secretary of War in the proper exercise of his duties as a United States officer acted either in a sovereign capacity or in good faith under the provisions of the original contract. On the contrary, we have the situation where an officer of the Government acted to protect a Government barge line which was not in existence when the original contract was made and acted with the intention of preventing Goltra from using the rights conferred upon him under his contract in such a manner as to compete with the subsequently established Government line. Such conduct will not be permitted by the courts. *Manners*

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[1] *United States* v. *Peck*, 102 U. S. 64, 65-66; *Anvil Mining Company* v. *Humble*, 153 U. S. 540, 552; *Manners* v. *Morosco*, 252 U. S. 317, 326-327; *Harper Bros.* v. *Klaw*, 232 Fed. 609, 612-613; *Louis Leavitt* v. *United States*, 60 C. Cls. 952, 972, 973; *Patterson* v. *Meyerhofer*, 204 N. Y. 96, 100-101; *Kirke La Shelle Co.* v. *Armstrong Co.*, 263 N. Y. 79, 87.

v. *Morosco,* 252 U. S. 317, 327; *Harper Bros.* v. *Klaw,* 232 Fed. 609, 612-613.

The analogy between these cases and the present case is close. In each the court held that the licensee had been granted only the right to produce plays and not the motion picture rights. In both cases, however, it was found that the production of the play in motion pictures was not contemplated by the parties when the license agreement was made and that, accordingly, it would be improper for the licensor to permit the production of the play in motion pictures which were competitive with the licensee's production of the play. In the present case not only did the Government create a competing barge line, but then took steps to prevent competition by Goltra with that line. Whatever else may be said of such conduct, certainly the Government cannot now claim that its wrongful conduct on this score should be considered as decreasing the use value of the vessels and preventing a substantial recovery.

In any event the restrictions as to operation would not apply after the option to purchase had been exercised.[1] Goltra twice exercised his option (Finding 10, R. 32; Finding 42, R. 44-45). The Government refused to perform its obligations (*id.*). The seizure of the fleet was assigned by the Government itself as sufficient reason for its action on the second occasion (Finding 42, R. 44-45). This action on the part of the Government is one of the "other legal

[1]The restrictive provision is "for the period of the lease" (§ 2 (a) R. 16), but when the parties contemplated a provision to be effective after the exercise of the option they so stipulated by saying "during the period of the lease, and in case of sale until title passes to the purchaser" (§ 2 (c) R. 17).

or equitable claims arising out of the transactions in connection" with the seizure (R. 14) and the petition makes this action one of the bases for recovery (Par. XVIII, R. 9). If the Government had not acted in violation of Goltra's rights, he could have rented the fleet to the Standard Oil Company pursuant to the terms of the offer made by that company, and thus realized precisely the rental figure which we contend should have been taken into consideration (R. 67-68). It is difficult to see how the Government can now claim that the right to possess the fleet and the contract rights had no substantial value because the Government, in addition to the seizure, committed another wrong.

III

THERE CAN BE NO QUESTION AS TO THE CREDIBILITY OF THE EVIDENCE ON RENTAL VALUE.

Plaintiffs' evidence of rental value was rejected by the Court of Claims solely as a matter of law (R. 54). The evidence consisted not only of unimpeached expert testimony (R. 69, 70-72), but also of statements made by Colonel John C. Gotwals, who represented the defendant (R. 69), and the testimony of an expert called by defendant in this litigation (R. 72). In addition the Government has stipulated on this appeal that Standard Oil Company of Louisiana made an offer in good faith to rent the Goltra fleet at the rental value testified to by plaintiffs' experts (R. 67). The Commissioner of the Court of Claims on the evidence presented made the finding of rental value requested by the plaintiffs (R. 59-60). The insinuation

that there is anything incredible about the evidence (Gov. Br., p. 59) as to rental value is therefore wholly unwarranted. Even the Government introduced evidence and asked for a finding on rental value in the court below (R. 69, 72). We are not now concerned with the amount of such value but with the problem whether rental value, at whatever figure it may be found, should be considered.

Since the decision in *The Conqueror,* 166 U. S. 110, 134 (Gov. Br., p. 59), experience has indicated that there is nothing unusual in a rental or use value for a vessel which in a relatively short period of time approximates a substantial percentage of the vessel's original cost. This Court knows, for example, that the earning power of vessels during the first world war was tremendous. One or two successful voyages were sufficient to pay the complete cost of a ship.

In the light of present experience it is not unusual to find, at a time when there was shortage of river equipment on the Mississippi River and when it would have taken two years to reproduce the Goltra fleet, that the rental value of this exceptional fleet should be the amount testified to by the experts, and in fact offered by Standard Oil Company of Louisiana.

IV

THE INTEREST DIFFERENTIAL MUST BE CONSIDERED.

One of the rights which Goltra lost by the seizure of the fleet was the contract right to possess the fleet immediately and to pay for it in fifteen equal annual installments

with four per cent. interest on the deferred payments. This was not, as the Government seems to contend, a contract for the loan of money (Gov. Br., pp. 76-77). The contract was one whereby Goltra obtained immediate possession of the fleet and obtained most satisfactory terms for paying therefor. In evaluating the contract it is patently necessary to consider whether the terms of the financing were in fact favorable or whether they could have been readily obtained elsewhere. The undisputed evidence shows that the terms of financing were most favorable, that they could not have been obtained elsewhere, and that any similar financing, if it could have been arranged at all, would have required not only the payment of a substantial bonus but interest at a rate in excess of six per cent.[1] (R. 76-82). At least the differential in interest rate should be considered.

To this contention the case of *Ches. & Ohio Ry.* v. *Kelly*, 241 U. S. 485 (Gov. Br., pp. 74-75), furnishes no answer whatever. In that decision it was held that the trial judge in an employer's liability case erred when he instructed the jury to award for the death of an employee his total estimated earnings. The proper instructions should have been that the jury must discount such earnings to a present value. This was to be accomplished by award-

[1]This evidence (R. 76-82) demonstrates the impossibility of obtaining another fleet upon terms anywhere near as favorable as those in Goltra's contract with the Government and answers the question now asked relative to Goltra's failure to build a substitute fleet (Gov. Br., p. 73, Note 24). It is one thing to finance out of income under a contract permitting this procedure; it is quite another to obtain a substantial amount of cash with no security other than future earning power.

ing a sum which, if invested in conservative investments would, together with a pro rata expenditure of the principal, yield the estimated earnings over a period of the deceased's life expectancy. We are at a loss to find the remotest analogy between that decision and any question here raised.

If, however, the value of the contract rights taken from Goltra by the seizure of the fleet is to be evaluated in part as if the contract had been one to loan money, it is elementary, where the borrower is unable to obtain a loan elsewhere upon the same terms, that the difference between the interest rate contracted for and the ordinary prevailing interest rate is one important element in fixing legal damages.[1] Cases cited at pages 76 and 77 of the Government's Brief do not stand for any contrary proposition.

V

THE SAME ELEMENTS MUST BE CONSIDERED UNDER THE SECOND CAUSE OF ACTION.

For the reasons which we have above stated, the rental or productive value of the unloading apparatus and the other factors discussed in our Main Brief (pp. 27-28) must be considered in evaluating the rights taken under the supplemental contract. Whatever may be the effect of the correspondence embodied in Finding 52 (R. 46-47) it is not

[1] *Hedden* v. *Schneblin*, 126 Mo. App. 478; *Farabee-Treadwell Co.* v. *Bank & Trust Co.*, 135 Tenn. 208; *Shurtleff* v. *Occidental B. & L. Ass'n.*, 105 Neb. 557, 561; *Doddridge* v. *American Trust & Savings Bank*, 98 Ind. App. 334; *Anderson* v. *Hilton & Dodge Co.*, 121 Ga. 688.

a waiver of the claims here made for the period from the seizure to August, 1930 (*Cf.* Gov. Br., pp. 79-80). For that period at least recovery of just compensation under the second cause of action should be awarded.

VI

THE AWARD OF THE COURT OF CLAIMS WAS WHOLLY INADEQUATE.

The fleet which was seized was composed of most substantial steel river vessels, valued at more than $3,500,000 at the time of the seizure (Finding 15, R. 34-35; R. 66-67). The contract rights which were also taken enabled Goltra to enjoy the possession of the fleet without any down payment whatever. He had fifteen years in which to pay for this fleet out of earnings. The acceptance of the five year Standard Oil offer alone would have enabled him to pay for the fleet, become the outright owner of it and have in addition well over $1,500,000 income (R. 66-67). That the use value of the fleet was far in excess of the amount awarded has been fully demonstrated in our Main Brief (pp. 24-26). The interest differential alone amounts to over six hundred thousand dollars (Main Br., Appendix C). The rental value for the two years necessary to reconstruct the fleet exceeds two million dollars (Main Br., Appendix C). The rental value for the life of the fleet runs into many millions (Main Br., Appendix D). The contract under which these rights accrued to Goltra was no gift from the Government but was made by the Government in consideration in part of the release of claims which Goltra had against the Government (R. 15). The award

of some $160,000 for the taking of all these rights must appear on the face of things wholly disproportionate. We do not urge this as an independent ground for reversal in the absence of the legal errors which we have pointed out. But this argument answers the Government's contention that what has been awarded here was more than adequate (Gov. Br., pp. 80-81).

CONCLUSION

On the appeal of the United States the judgment below should be affirmed. On the appeal of cross-appellants the judgment below should be reversed with directions to consider the additional factors set forth in our Main Brief in arriving at an award of just compensation.

Respectfully submitted,

RICHARD E. DWIGHT,
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JOHN F. CASKEY,
FREDERICK W. P. LORENZEN,
Counsel for Appellees-Cross-Appellants.

January 3, 1941.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 192

KATE B. GOLTRA AND E. FIELD GOLTRA, JR., EXECUTORS OF THE ESTATE OF EDWARD F. GOLTRA, DECEASED
Appellants,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

STATEMENT OF JURISDICTION.

HERMAN J. GALLOWAY,
FREDERICK W. P. LORENZEN,
Counsel for Appellants.

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INDEX.

SUBJECT INDEX.

	Page
Statement as to jurisdiction	1
Statutory provision believed to sustain jurisdiction	1
Date of judgment and of application for appeal	2

CASE CITED.

Sioux Indians v. *United States*, 277 U. S. 424	3

STATUTE CITED.

Private Act No. 69, approved April 18, 1934 (48 Stat. 1322)	1

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 192

KATE B. GOLTRA AND E. FIELD GOLTRA, JR., EXECUTORS OF THE ESTATE OF EDWARD F. GOLTRA, DECEASED
Appellants,

vs.

THE UNITED STATES.

STATEMENT IN SUPPORT OF JURISDICTION ON CROSS-APPEAL AS REQUIRED BY RULE 12.

Pursuant to Rule 12, the above plaintiffs file this their statement showing the basis on which said plaintiffs contend that the Supreme Court has jurisdiction to review on appeal the judgment appealed from herein, as follows:

I. The statute believed to sustain appellate jurisdiction is Private Act No. 69, enacted at the Second Session of the Seventy-third Congress of the United States and approved by the President on April 18, 1934 (48 Stat. 1322), which is as follows:

> "*Be it enacted by the Senate and House of Representatives of the United States of America Congress assembled,* That jurisdiction is hereby conferred upon the Court of Claims of the United States, whose duty

it shall be, notwithstanding the lapse of time or the bar of any statute of limitations or previous court decisions, to hear, consider, and render judgment on the claims of Edward F. Goltra against the United States for just compensation to him for certain vessels and unloading apparatus taken, whether tortiously or not, on March 25, 1923, by the United States under orders of the Acting Secretary of War, for the use and benefit of the United States; and any other legal or equitable claims arising out of the transactions in connection therewith: *Provided,* That separate suits may be brought with respect to the vessels and the unloading apparatus, but no suit shall be brought after the expiration of one year from the effective date of this Act: *Provided further,* That either party may appeal as of right to the Supreme Court of the United States from any judgment in said case at any time within ninety days after the rendition thereof, and any judgment rendered in favor of the claimant shall be paid in the same manner as other judgments of said Court of Claims are paid."

II: The judgment, from a part of which this cross-appeal is taken, was made and entered on the 1st day of April, 1940.

III. The application for cross-appeal was allowed on the 25th day of June, 1940.

IV. The cross-appeal herein is from a part of a judgment entered in an action brought under said private jurisdictional act quoted in paragraph numbered I above, and, accordingly, this cross-appeal is precisely within the language of the last proviso of the Act

"That either party may appeal as of right to the Supreme Court of the United States from any judgment in said case at any time within ninety days after the rendition thereof, * * *."

V. It is believed that the precise wording of the said private jurisdictional Act is sufficient to sustain the jurisdiction herein. *Sioux Indians* v. *United States*, 277 U. S. 424, 427.

Dated: June 24, 1940.

Respectfully submitted,

DWIGHT, HARRIS, KOEGEL & CASKEY,
Attorneys for Plaintiffs.

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Supreme Court of the United States.

OCTOBER TERM, 1939.

No. 192

KATE B. GOLTRA AND E. FIELD GOLTRA, JR.,
EXECUTORS OF THE ESTATE OF
EDWARD F. GOLTRA, DECEASED,
PETITIONERS,
v.
THE UNITED STATES,
RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS.

HERMAN J. GALLOWAY,
FREDERICK W. P. LORENZEN,
Attorneys for Petitioners.

June, 1940.

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INDEX.

	PAGE
Opinion Below	1
Jurisdiction	1
Question Presented	2
Statutes Involved	2
Statement	3
Specifications of Errors to be Urged	5
Reasons for Granting Writ	10
Conclusion	14
Appendix "A"	15

CITATIONS.

Cases.

Brooks-Scanlon Corp. *v.* U. S., 265 U. S. 106, 123, 126	11
City of Chicago *v.* Lehman, 262 Ill. 468, 474	13
Clark *v.* Hot Springs Elec. Light & Power Co., 55 Fed. (2d) 612	12
Faust *v.* Hosford, 119 Iowa 97, 104	13
Gatling *v.* Newell, 9 Ind. 572, 583	13
Georgia, Florida & Alabama Ry. Co. *v.* Spivey, 14 Ga. App. 157	13
German-American Bank *v.* Spokane, etc. Nav. Co., 49 Wash. 359	13
Gulf Refining Co. *v.* U. S., 58 C. Cls. 559, 577	11
Heiner *v.* Crosby, 24 Fed. (2d) 191, 193	12
Hudson Navigation Co. *v.* U. S., 57 C. Cls. 411, 415, 416-417	11
Jackson *v.* Innes, 231 Mass. 558, 560–561	14
Monongahela Navigation Co. *v.* U. S., 148 U. S. 312, 328, 329, 343	11
North American Telegraph Co. *v.* Northern Pac. Ry. Co., 254 Fed. 417, 418, 419	13
Phelps *v.* U. S., 274 U. S. 341, 344	11
Republican Newspaper Co. *v.* Northwestern Associated Press, 51 Fed. 377	12

Rottlesberger *v.* Hanley, 155 Iowa 638, 647 13
Seaboard Air Line Ry. *v.* U. S., 261 U. S. 299, 304 11
Sharp *v.* U. S., 191 U. S. 341 12
Sommers *v.* Commissioner Internal Revenue, 63 Fed. (2d) 551 12
The Lagonda, 44 Fed. 367, 369 14
The Waalhaven, 1 Fed. Supp. 396, 397; 64 Fed. (2d) 25, 289 U. S. 752 12
United States *v.* New River Collieries, 262 U. S. 341, 343, 345 11
Williamson, et al., *v.* Barrett, 13 Howard 101, 111, 112 14

Miscellaneous.

Chamberlayne, The Modern Law of Evidence (Vol. 3, sec. 2175g) 13
27 Columbia Law Review, 98 14
39 Harvard Law Review, 760 14

Statutes.

Special Jurisdictional Act (48 Stat. 1322) Appendix 15

IN THE

upreme Court of the United States.

OCTOBER TERM, 1939.

No.

ATE B. GOLTRA AND E. FIELD GOLTRA, JR., Executors of the Estate of EDWARD F. GOLTRA, Deceased,
Petitioners,

v.

THE UNITED STATES,
Respondent.

ETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS.

The petitioners pray that a writ of certiorari issue to review rtain portions of the judgment of the Court of Claims in the ove case.

Opinion Below.

The opinion of the Court of Claims is not yet officially ported.

Jurisdiction.

The judgment of the Court of Claims was entered on April 1, 40. The judgment was rendered under a Special Jurisdic- nal Act which provides for an appeal as of right. In this se the respondent has appealed to this Court and the peti- ners herein have been allowed a cross-appeal. The respond- has also filed a petition for writ of certiorari. The juris- tion of this Court is invoked on this petition under Section b) of the Act of February 13, 1925, as amended.

Question Presented.

Two principal categories of questions are presented. First, whether the Court of Claims in computing the amount of just compensation to be awarded to petitioners under the terms of the Special Jurisdictional Act erred in failing to take into consideration the rental value of the towboats and barges which it found were taken by the respondent for its use and benefit and whether that court erred in failing to consider the earning capacity of that fleet as measured by its rental value, and whether it also erred in failing to consider an offer made to lease the towboats and barges for a term of five years at a rental exceeding one million dollars per year. Second, if this Court grants respondent's petition for a writ of certiorari and on review decides that the Court of Claims should not have adjudged recovery here on the basis of the usual principles of just compensation but should have awarded the recovery upon the basis of a legal claim for damages, then the Court of Claims also erred in failing to take into consideration the rental value of the towboats and barges, the earning power of the towboats and barges as measued by their rental value, an offer made to lease the towboats and barges for a term of five years at a rental of over a million dollars a year, and prospective profits of which Goltra was deprived by the acts of respondent.

Statutes Involved.

The only statute involved is the Special Jurisdictional Act which is set forth in Appendix "A" (*infra*, p. 15).

Statement.

On May 28, 1919, Goltra and the United States, acting through the Chief of Engineers, entered into a contract, referred to in this case as the original contract, and on May 26, 1921, the same parties entered into a supplemental contract (Finding 6). These contracts, which are respectively Exhibits B and C to the petition (Finding 6), gave Goltra the right to possess a fleet of nineteen steel barges and four steel towboats

to be operated on the Mississippi River and its tributaries (Exhibit B of petition). Under the contract Goltra was to have possession as lessee for a term of five years after the delivery of the fleet (*id.*). The only rental payable was to consist of the net earnings of the fleet and these net earnings were to be credited to the purchase price of the fleet if Goltra exercised an option conferred upon him to purchase the fleet at an appraised value (*id.*). Under this option provision the balance of the purchase price was payable in fifteen equal annual instalments (*id.*). Goltra in fact twice exercised his option but respondent refused to perform the option provision (Findings 10 and 42). Goltra thus in addition to having a lessee's property rights in the fleet had the other property rights conferred upon him by the option provisions.

Before the fleet was completed and delivered to Goltra, the respondent established a barge line of its own on the Mississippi River (Finding 8). The existence of this competing barge line led to difficulties between Goltra and the Secretary of War under whose jurisdiction the competing line was operated (Findings 9, 11, 12, 13 and 14).

The original contract was subject to cancellation if in the judgment of the Chief of Engineers, who was designated the lessor, Goltra had not performed his obligations thereunder (Exhibit B of petition; Opinion p. 26).

Within a few months after the fleet had been delivered to Goltra (Findings 15 and 23), the Secretary of War, not the Chief of Engineers, purported to cancel Goltra's contract and he demanded a return of the fleet by delivery to Colonel Ashburn, Chief of the competing Government barge line (Finding 23). Goltra refused to comply with the Secretary of War's demand (Finding 25). Thereafter, on March 22, 1923, Colonel Ashburn was authorized by the Acting Secretary of War to take possession of the Goltra fleet (Finding 27).

The manner in which Colonel Ashburn carried out this mandate is described by the Court of Claims as follows (Finding 28):

> "On Sunday, March 25, 1923, while plaintiff was in New York, Ashburn, and several men under his command,

> acting under orders of the Acting Secretary of War, went to the several places where seventeen of the barges and the four towboats lay moored in the possession of plaintiff's employees and took them from the possession of said employees without the consent of plaintiff or his employees for the use and benefit of the United States."

The Goltra fleet remained in the custody of respondent until September, 1924 (Finding 37). Under a temporary restraining order issued September 4, 1924, possession of the fleet was temporarily returned to Goltra (Finding 39) but after further court action the injunction was dissolved and the property was returned to respondent in August, 1926 (Finding 40). Since that time "defendant [respondent] has retained possession of the boats and barges * * * and has caused the same to be operated as a part of the Mississippi Warrior Service" (Finding 40).

The Court of Claims found that Goltra had performed all his obligations under the contracts (Finding 32, 33, 34, 35; Opinion p. 27). Furthermore, the Chief of Engineers, to whose judgment the contracts had entrusted the determination of whether Goltra had or had not performed his contract, at no time formed a judgment that Goltra had not performed his obligations thereunder (Findings 31, 38; Opinion p. 29).

Goltra expended very substantial sums in connection with the original and supplemental contracts, including sums for improving the fleet, certain real estate used in connection therewith and repairing damage done to the fleet by respondent (Findings 43, 44, 45, 46, 47, 48, 50, 51). For these expenditures Goltra was never reimbursed and respondent benefited thereby when it took the property (*id.* and Finding 33).

It follows that when the respondent took possession of Goltra's fleet for the use and benefit of the United States, the right to possession and other contract rights in relation to the fleet, which were valuable property rights and belonged to Goltra, were taken from him.

By the Special Jurisdictional Act herein, jurisdiction was conferred upon the Court of Claims "whose duty it shall be,

notwithstanding the lapse of time or the bar of any statute of limitations or previous court decisions, to hear, consider, and render judgment on the claims of Edward F. Goltra against the United States for just compensation to him for certain vessels and unloading apparatus taken, whether tortiously or not, on March 25, 1923, by the United States under orders of the Acting Secretary of War for the use and benefit of the United States; and any other legal or equitable claims arising out of the transactions in connection therewith;" * * *.

The Court of Claims held that petitioners were entitled to recover in order to constitute "just compensation" the sum of $350,000, with interest at six percent (6%) per annum, not as interest but as a part of "just compensation" from March 25, 1923, to the date of payment.

The record in this Court shows that evidence was offered of the reasonable market rental values of the boats and barges on the Mississippi River and its tributaries during the pertinent times. The record further shows that officials of the Standard Oil Company of Louisiana testified as witnesses on behalf of the petitioners that in May, 1925, when Goltra had the fleet under the court order in the original litigation, the Standard Oil Company of Louisiana, which was financially solvent and able to carry out such an arrangement, offered to lease the fleet from Goltra for a period of five years, with an option to renew for an additional period of five years, on a bare boat basis for a rental of over $1,000,000 per annum. Such an arrangement would have resulted in a clear profit to Goltra of practically the entire sum of $1,000,000 a year. The Court of Claims, in its opinion, stated: "It is contended by the plaintiff that, in arriving at just compensation an offer to rent the fleet made years after the fleet had been seized and the rental value of similar vessels on the Mississippi River should be taken into consideration. These contentions can not be sustained" (opinion p. 30).

Specifications of Errors to be Urged.

I. The Court of Claims erred in failing to make the following special findings of fact requested by petitioners, each of which

was made by the Commissioner of this Court assigned to hear this cause:

A. The requested special finding of fact embodied in the Commissioner's finding 59, which is as follows:

> "The average cost of the towboats was $375,000 each. The average cost of the barges was $110,000 each.
>
> "The value of the towboats and the barges from the year 1922 and thereafter until the end of the year 1924 was approximately the same as the original cost thereof."

B. The requested special finding of fact embodied in the Commissioner's finding 60, which is as follows:

> "The reasonable market rental value on the Mississippi River and its tributaries of the towboats from March, 1922, to the present time was 1/15th of one per cent per day of the cost of each towboat, the lessee furnishing all of the crew, food, fuel, and other supplies, and assuming all risks and costs of insurance, maintenance, repairs necessary for operation and a return of the towboats to the lessor at the end of the lease in the same condition in which received, and all other costs of operation, except the expense of annual heavy overhaul and repair amounting to an average of $2,000 per year per towboat.
>
> "The reasonable market rental value on the Mississippi River and its tributaries of the barges from March, 1922, to the present time was 1/10th of one per cent per day of the cost of each barge, the lessee furnishing all of the crew, food, fuel, and other supplies, and assuming all risks and costs of insurance, maintenance, repairs necessary for operation and a return of said barges to the lessor at the end of the lease in the same condition in which received, and all other costs of operation, except the expense of annual heavy overhaul and repair amounting to an average of $500 per year per barge."

C. The requested special finding of fact embodied in the Commissioner's finding 61, which is as follows:

> "In May, 1925, C. J. Fiero, vice president and general manager of Standard Oil Company of Louisiana, and

E. F. Wieck, superintendent of lighterage of that company, desired to acquire for that company the use of the barges and towboats for the transportation of crude oil from its pipe line terminal at Grand Lake, Arkansas, down the Mississippi River to its refinery at Baton Rouge, Louisiana, and for the transportation of refined oils up the river from Baton Rouge on the return trips, and for this purpose made an offer in behalf of Standard Oil Company of Louisiana to lease from plaintiff the nineteen barges and four towboats upon the following terms: Standard Oil Company of Louisiana was to furnish all of the crew, food, fuel, and other supplies and to assume all risks and costs of insurance, maintenance, repairs, and all other costs of operation, and was to pay to plaintiff rental at the rate of 1/15th of one per cent per day on the cost of said towboats, assumed to be $400,000 each, and 1/10th of one per cent per day on the cost of said barges, assumed to be $110,000 each, for a period of five years with the option to Standard Oil Company of Louisiana to continue to lease upon such terms for an additional period of five years. Plaintiff was willing and desired to accept the offer, but on account of the then pending litigation over his right to continue in possession of the barges and towboats, he was unable to do so as he could not assure Standard Oil Company of Louisiana of possession of the barges and towboats for the terms of the proposed lease. This offer was made in good faith and Standard Oil Company of Louisiana was at all times financially able to carry out the obligations which would have devolved upon it had a lease been made pursuant to its offer."

D. The requested special finding of fact embodied in the Commissioner's finding 62, which is as follows:

"In the years 1922 through 1924, it would have been impossible for plaintiff to obtain a fleet of barges and towboats similar to those here involved in the open market and it would have required a period of at least two years after the date of the letting of the contracts therefor to have such barges and towboats built.

"In the year 1926 it would have been impossible for plaintiff to obtain a fleet of barges and towboats similar to those here involved in the open market and it would have required a period of at least twenty months after the date

of the letting of the contracts therefor to have such barges and towboats built."

E. The requested special finding of fact embodied in the Commissioner's finding 64, which is as follows:

"On March 25, 1923, the towboats and barges had a remaining normal and useful life of about thirty years."

F. The requested special finding of fact embodied in the Commissioner's finding 66, which is as follows:

"The land provided by plaintiff for the unloading facilities had a reasonable value of $20,000 throughout the period from 1921 to 1931."

G. The requested special finding of fact embodied in the Commissioner's finding 68, which is as follows:

"The erection of the unloading facilities on the runways under the provisions of the supplemental contract cost $210,000."

H. The requested special finding of fact embodied in the Commissioner's finding 71, which is as follows:

"During the period from March 25, 1923, to the present time, the reasonable rental value of the unloading facilities was $25,000 per year."

I. The requested special finding of fact embodied in the Commissioner's finding 72, which is as follows:

"From the time when plaintiff surrendered the unloading facilities to defendant in July, 1926, pursuant to the court order, to the present time, plaintiff has provided one day and one night watchman for necessary services in watching the unloading facilities for the benefit of defendant and has obligated himself to pay or has paid $125 per month for each watchman, which was a reasonable expense therefor and for which plaintiff has never been paid."

J. The requested special finding of fact embodied in the Commissioner's finding 75, which is as follows:

> "In the years 1923 through 1926, both inclusive, if any loan had been negotiated for a sum of money sufficient to reproduce the towboats and barges under a loan agreement permitting and requiring repayment in fifteen equal annual installments during a period of fifteen years commencing one year after the making of the loan, the borrower would have been required to pay interest on such loan for the duration thereof at the rate of 6.138 per cent per year. In addition the borrower would have been required to pay a substantial commission or discount and to give as a bonus an interest in the operation of the towboats and barges."

II. The Court of Claims erred in failing to take into consideration in determining the amount of recovery an offer made by the Standard Oil Company of Louisiana to rent the Goltra fleet, the substance of which offer is embodied in the requested special finding of fact which is the Commissioner's finding 61, set forth above.

III. The Court of Claims erred in finding and concluding that there was no market value for Edward F. Goltra's lease of said fleet and the option to purchase.

IV. The Court of Claims erred in failing to take into consideration, in arriving at the award made to the petitioners an amount measured by the net reasonable market rental value of said fleet on the Mississippi River and its tributaries from March, 1922, to the date of judgment.

V. The Court of Claims erred in failing to take into consideration, in arriving at the award made to the petitioners an amount measured by the rental value of said fleet which amount said fleet could and would have earned but for the seizure of said fleet by respondent's officers for the use and benefit of respondent.

VI. The Court of Claims erred in failing to take into consideration in arriving at the award made to the petitioners prospective profits which would have resulted from petitioners property rights in said fleet but for the seizure thereof by representatives of respondent for the use and benefit of respondent.

VII. The Court of Claims erred in limiting the amount of recovery by way of just compensation to the sum of $350,000 with interest at six per cent, per annum, not as interest, but as part of just compensation.

Reasons for Granting Writ.

The Court of Claims has determined that recovery in this case should be adjudged on the basis of just compensation as indicated in the Special Jurisdictional Act. The Court of Claims, however, erred in failing to take into consideration certain elements necessary to arrive at just compensation.

This petition is essentially a cross-petition made necessary by the respondent's petition for a writ of certiorari. Respondent contends in its petition that the Court of Claims erred in determining the amount of recovery. If this Court determines to review the judgment of the Court of Claims as to the amount of recovery, then the petitioners believe that the entire question of the amount of compensation should be reviewed. A serious wrong would be done petitioners if this Court should determine on respondent's petition that recovery should not be measured by just compensation as that term has been heretofore defined and should therefore deprive the petitioners of a sum measured by interest without directing the Court of Claims in entering judgment to take into account other elements which should certainly in that event be considered.

Petitioners concede that if this Court does not grant respondent's petition for a writ of certiorari and if this Court holds that an appeal as of right does not lie in this case under the Special Jurisdictional Act, then no grounds for review of the judgment below are presented and no basis for this petition exists.

A. *The Court of Claims Committed Prejudicial Error in Failing to Take Into Consideration Certain Evidence Bearing on the Question of Just Compensation.*

The Court of Claims in its opinion (p. 30) has stated specifically that it has not taken into consideration an offer for the rental of the fleet or the rental value of similar vessels. We suppose that the latter phrase refers to the evidence of reasonable market rental value offered by petitioners. The record as stipulated on this petition shows that there was a substantial rental value for the fleet and that an offer to rent the fleet at a sum in excess of a million dollars a year was made in good faith by a corporation adequately financed to carry out the offer.

The award of just compensation entitles petitioners to the full and perfect equivalent of the property taken paid contemporaneously with the taking. *Monongahela Navigat'n Co.* v. *United States*, 148 U. S. 312, 328, 329, 343; *Seaboard Air Line Ry.* v. *U. S.*, 261 U. S. 299, 304; *U. S.* v. *New River Collieries*, 262 U. S. 341, 343, 345; *Brooks-Scanlon Corp.* v. *U. S.*, 265 U. S. 106, 123, 126; *Phelps* v. *United States*, 274 U. S. 341, 344.

In *Monongahela Navigat'n Co.* v. *United States*, 148 U. S. 312, *supra*, this Court held that the full and perfect equivalent of property "generally speaking, is determined by its productiveness—the profits which its use brings to the owner" (p. 328). It is impossible to see how just compensation in this case can be determined without taking into account the productive value of the fleet taken, namely, its rental value. It is that rental value which measured the usefulness of the fleet. The taking of the fleet deprived Goltra of that element. Indeed, the Court of Claims in *Hudson Navigation Co.* v. *U. S.*, 57 C. Cls. 411, 415, 416–417, and *Gulf Refining Co.* v. *U. S.*, 58 C. Cls. 559, 577, has heretofore recognized that the rental value of ships is a factor to be considered in awarding just compensation. Failure to take into account the use or rental value of the fleet here has deprived the petitioners of a large element of value which should have entered into a determination of the final award.

An award as small as the principal award made in this case,

taking into consideration the fact that more than half of the sum of $350,000 is comprised of items of out-of-pocket expenditures (Findings 43, 44, 45, 46, 47, 48, 50, 51; Opinion, pp. 30–31), indicates clearly the prejudice which resulted to petitioners from a failure to take into consideration not only the rental value of the fleet but the actual offer made to rent the entire fleet for a period of five years at a net rental of approximately one million dollars a year. The record stipulated on this petition shows that this offer was made in good faith by a responsible concern and that there was no objection to the evidence which established this offer at the time when such evidence was introduced. Respondent thus seems to be estopped to question the competency of the offer for rental.

Furthermore, the cases of *Sharp* v. *United States*, 191 U. S. 341; *Clark* v. *Hot Springs Electric Light & Power Co.*, 55 Fed. (2d) 612; and *Sommers* v. *Commissioner of Internal Revenue*, 63 Fed. (2d) 551, dealing with real estate matters, do not prevent a consideration of this offer in this case. In the *Sharp* case this Court decided that in valuing real estate the unsupported testimony of the claimant with respect to an offer made to him was not admissible but the Court's opinion expressly recognizes the possibility that offers made, particularly for chattels, would under proper circumstances be admissible in evidence. This court indicated that an offer was admissible and had probative value if it was (p. 349) "* * * an honest offer made by an individual capable of forming a fair and intelligent judgment, really desirous of purchasing, entirely able to do so, and to give the amount of money mentioned in the offer." The stipulated record in this case clearly shows that the present offer comes within the rule as thus stated and was established by the testimony of those who made the offer.

Whether the distinction between offers for real estate and offers for chattels is or is not a sound one, the authorities seem to be uniform that bona fide offers for chattels if pertinent in point of time are admissible in evidence where value of chattels is in issue. *Heiner* v. *Crosby*, 3 Cir., 24 Fed. (2d) 191, 193; *The Waalhaven*, S. D. N. Y., 1 Fed. Supp. 396, 397, affirmed 64 Fed. (2d) 25, cert. denied 289 U. S. 752; *Republican News-*

paper Co. v. *Northwestern Associated Press*, 8 Cir., 51 Fed. 377. The rule has been similarly established in the State courts. *German-Am. etc. Bank* v. *Spokane etc. Nav. Co.*, 49 Wash. 359, 360-361; *Rottlesberger* v. *Hanley*, 155 Iowa 638, 647; *Georgia, Florida & Alabama Railway Co.* v. *Spivey*, 14 Ga. App. 157; see also *Gatling* v. *Newell*, 9 Ind. 572, 583; *Chamberlayne*, The Modern Law of Evidence (Vol. 3, Sec. 2175g).

There is a tendency even in real estate cases to admit evidence of offers made in good faith and proved beyond question. *North American Telegraph Co.* v. *Northern Pac. Ry. Co.*, 8 Cir., 254 Fed. 417, 418, 419; *Faust* v. *Hosford*, 119 Iowa 97, 104; *City of Chicago* v. *Lehmann*, 262 Ill. 468, 474.

As the making of the offer in the present case is not disputed and its good faith is unquestioned, we believe that under the foregoing authorities the evidence in the present case should have been considered in determining the use value of the fleet for the purpose of arriving at an award of just compensation based in part upon that value.

B. *If this Court on Respondent's Petition for a Writ of Certiorari Determines that the Award Here Should not be Based upon the Usual Principles of Just Compensation, then* a fortiori *the Rental Value of the Fleet and the Offer to Lease should be Considered upon a Recomputation of the Award.*

It seems to be respondent's contention that the Special Jurisdictional Act in using the words "just compensation" did not intend a mandate to award compensation on that basis. Petitioners have argued elsewhere the error inherent in respondent's contention. If this Court should, however, conclude that an award here must be based upon legal principles of damages applicable in tort or contract cases then it is clear that the market rental value of the fleet must form a part of the judgment to be awarded. In cases involving torts or breach of contract with relation to ships, the courts in this country have adopted a theory of objective compensation, giving to the owner the rental value of the ship irrespective of

whether profits could have been realized or whether the owner in fact would or could have chartered the ship in question. *Williamson et al.* v. *Barrett*, 13 How. 101, 111, 112; *The Lagonda*, E. D. N. Y., 44 Fed. 367, 369; *Jackson* v. *Innes*, 231 Mass. 558, 560–561; 39 Harvard Law Review, 760; 27 Columbia Law Review, 98.

The rule is well stated in *Jackson* v. *Innes, supra*, where defendant "'with force and arms took and carried away" (p. 559) the plaintiff's boat and converted it to his own use. The Supreme Court of Massachusetts stated the measure of plaintiff's recovery as follows (pp. 560–561):

> "The plaintiff who is entitled to full compensation for all the injury suffered also can have damages for the loss of the use of the boat during the period of detention. It is of no consequence that no income was derived from it. The defendant who is a wrongdoer can not avoid liability on that ground. * * * And evidence of the fair market rental value for the use of the boat was admissible on the question of damages."

If as respondent now contends the present taking was a tort and the usual measure of damages for a tort is here applicable, then the decision in *Jackson* v. *Innes, supra*, precisely fits the case.

The argument above made (pp. 11 to 13) with reference to the offer to rent the Goltra barges is equally applicable whether the measure of recovery is just compensation or legal damages. The question is merely one of the competency and probative force of the offer under the cases cited. The offer must also be considered in arriving at any legal damages to be awarded the petitioners.

Conclusion.

It is respectfully submitted that, for the reasons stated, this petition for a writ of certiorari should be granted.

HERMAN J. GALLOWAY,
FREDERICK W. P. LORENZEN,
Attorneys for Petitioners.

June, 1940.

APPENDIX "A."

AN ACT

Conferring jurisdiction upon the Court of Claims of the United States to hear, consider, and render judgment on the claims of Edward F. Goltra against the United States arising out of the taking of certain vessels and unloading apparatus.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That jurisdiction is hereby conferred upon the Court of Claims of the United States, whose duty it shall be, notwithstanding the lapse of time or the bar of any statute of limitations or previous court decisions, to hear, consider, and render judgment on the claims of Edward F. Goltra against the United States for just compensation to him for certain vessels and unloading apparatus taken, whether tortiously or not, on March 25, 1923, by the United States under orders of the Acting Secretary of War, for the use and benefit of the United States; and any other legal or equitable claims arising out of the transactions in connection therewith: *Provided,* That separate suits may be brought with respect to the vessels and the unloading apparatus, but no suit shall be brought after the expiration of one year from the effective date of this Act: *Provided further,* That either party may appeal as of right to the Supreme Court of the United States from any judgment in said case at any time within ninety days after the rendition thereof, and any judgment rendered in favor of the claimant shall be paid in the same manner as other judgments of said Court of Claims are paid.

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No. 192

In the Supreme Court of the United States

OCTOBER TERM, 1940

KATE B. COUTRA AND E. EMILE COUTRA, JR., EXECUTORS OF THE ESTATE OF EDWARD P. COUTRA, DECEASED, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

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INDEX

	Page
Opinion below	1
Jurisdiction	1
Question presented	2
Statutes involved	2
Statement	2
Argument	5
Conclusion	8
Appendix	9

CITATIONS

Cases:

Clarke v. *Hot Springs Electric Light & Power Co.*, 55 F. (2d) 612 — 7

Goltra v. *Weeks*, 271 U. S. 536 — 4

Sharp v. *United States*, 191 U. S. 341 — 6

Sommers v. *Commissioner of Internal Revenue*, 63 F. (2d) 551 — 7

Standard Oil Co. v. *So. Pacific Co.*, 268 U. S. 146 — 7

United States v. *New River Collieries Co.*, 262 U. S. 341 — 7

Statute:

Private Law No. 69, April 18, 1934, 73d Cong., 2d Sess. (c. 150, 48 Stat. 1322) — 9

Miscellaneous:

Orgel, *Valuation under Eminent Domain* — 7

247156—40

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OPINION BELOW

The opinion of the Court of Claims is not yet officially reported.

JURISDICTION

The judgment of the Court of Claims was entered April 1, 1940. The jurisdiction of this Court is invoked under Section 3 (b) of the Act of February 13, 1925, as amended.

QUESTION PRESENTED

The Secretary of War seized vessels leased to the respondent; the court below found the seizure tortious and unauthorized. The question presented is whether the court, in valuing petitioner's lease, should, in the circumstances of this case, have considered market value, and particularly whether it should have considered evidence as to an offer to rent the vessels, made two years after the seizure.

STATUTES INVOLVED

The applicable portions of the statutes involved are set forth in the Appendix, *infra*, p. 9.

STATEMENT

On May 28, 1919, a contract was entered into between petitioner[1] and respondent, represented by the Chief of Engineers, United States Army, providing for the lease to petitioner, with an option to purchase, of certain barges and towboats which respondent was constructing for use as carriers on the Mississippi River and its tributaries.[2] Section 8 of the contract provided that the Chief of Engineers, as lessor, could terminate the contract at any

[1] Upon the death of Edward F. Goltra on April 2, 1939, his executors, Kate B. Goltra and E. Field Goltra, Jr., were substituted as parties plaintiff (Fdg. 1). "Petitioner," when used herein, refers to the executors as well as to Edward F. Goltra.

[2] A supplemental contract between the same parties providing for certain unloading facilities was entered into and made a part of the original contract on May 26, 1921 (Fdg. 6).

time that in his judgment petitioner was guilty of a breach of the contract. After various negotiations concerning the rates to be charged by petitioner (Fdgs. 8–14), nineteen barges and four towboats were delivered to petitioner on July 15, 1922 (Fdg. 15). These vessels, owing to mechanical difficulties and low water, were operated by petitioner on a very limited scale (Fdgs. 16, 17, 35).

About December 1, 1922, petitioner, with the consent of the District Engineer, and in accordance with local custom, placed the barges and towboats in winter quarters at St. Louis, Missouri (Fdg. 18). During this lay-up period petitioner was informed that various commercial organizations interested in transportation on the Mississippi River had complained to the Secretary of War of the inactivity of this fleet, and was notified by the Secretary that a failure to operate at maximum capacity would be regarded as a violation of the contract (Fdg. 20). Subsequently, while the boats were still tied up, the Secretary of War, on March 3, 1923, notified petitioner that because he had failed to comply with the terms of the contract, the contract was terminated (Fdg. 23). Petitioner, on being informed of the Secretary's action, refused to comply with his request to deliver the boats to the designated official (Fdg. 25). On March 25, 1923, pursuant to orders of the Acting Secretary of War (Fdg. 29), the boats were seized from petitioner and possession taken by the United

States (Fdg. 28). On April 27, 1923, petitioner was notified by the Chief of Engineers that in his judgment petitioner had failed to comply with the terms of the contract and therefore he was terminating the contract; the letter was signed at the direction of the Secretary of War and did not represent the judgment of the Chief of Engineers (Fdg. 38).

Petitioner brought suit against the Secretary of War, seeking to enjoin him from seizing the vessels. The suit was concluded by a judgment of this Court adverse to petitioner (Fdg. 40), based on the ground that the Chief of Engineers, as lessor, representing the United States, had exercised his judgment, without fraud, in terminating the contract. *Goltra* v. *Weeks,* 271 U. S. 536.[3]

This action was instituted in the Court of Claims on July 21, 1934, pursuant to Private Act No. 69, 73d Cong., 2d Sess., *infra,* p. 9, conferring jurisdiction upon that court to hear, determine, and enter judgment upon the "claims of Edward F. Goltra against the United States for just compensation" for the taking of the vessels and unloading apparatus, whether taken "tortiously or not,"

[3] As petitioner obtained a temporary injunction in the district court (Fdg. 39), he regained possession of the vessels in September 1924 (Fdg. 39). However, by reason of the Supreme Court decision in *Goltra* v. *Weeks, supra,* respondent again took possession of the vessels during July 1926 (Fdg. 40).

without regard to the statute of limitations, or to any previous court decisions.

The court below found that the Chief of Engineers had not exercised his own judgment in cancelling the contract, but had been coerced into cancelling the contract subsequent to the actual seizure of the vessels. It accordingly held that the contract had not been terminated in accordance with its provisions, and that the seizure of the vessels was tortious and unauthorized. The court allowed $350,000.00 as compensation for the vessels, unloading apparatus, and all other claims. To this amount it added interest, as "part of just compensation," at six percent from the date of the seizure.

In computing the amount of the compensation the Court of Claims did not make certain findings of fact requested by petitioner with regard to the market rental value of the vessels. The court held that evidence of an offer to rent the vessels, made two years after the seizure, could not be considered, and that the rental value of similar vessels on the Mississippi River could not be taken into account because there were none at that time. Hence it concluded that "There was no market value for the lease and option to purchase."

ARGUMENT

Petitioner brought this suit against the United States under a special jurisdictional Act to recover compensation for the alleged illegal seizure by

agents of the United States of certain vessels which the United States had leased to petitioner. The court below held that the seizure was illegal, and awarded to petitioner $350,000.00, with interest, as compensation.

The Government thinks the special jurisdictional Act confers the right of appeal to this Court, and has taken an appeal as to the allowance of interest against the United States. Out of an abundance of caution the United States has also filed a petition for certiorari on that issue (No. 191 this Term). Petitioner has filed a cross appeal as to the amount of the judgment, and the petition for certiorari to which this brief in opposition is directed. Petitioner, conceding that standing alone the petition presents no grounds for certiorari, presses it only if the Court holds that the appeal and cross appeal do not lie and grants the Government's petition (Pet. 10).

1. Petitioner complains (Pet. 11–13) of the refusal of the court below to take into consideration market rental value, which petitioner sought to establish principally by evidence of an offer by officials of the Standard Oil Company, made two years after seizure of the vessels, to lease them for a period of five years. The holding below follows the rule that property of a sort not actively traded in has no market value, so that offers to buy it are not necessarily admissible for determining the value of such property. *Sharp* v. *United*

States; 191 U. S. 341, 348–349; *Sommers* v. *Commissioner of Internal Revenue,* 63 F. (2d) 551, 552–553 (C. C. A. 10th); *Clarke* v. *Hot Springs Electric Light & Power Co.,* 55 F. (2d) 612, 616 (C. C. A. 10th). Compare *Standard Oil Co.* v. *So. Pacific Co.,* 268 U. S. 146, 155; Orgel, *Valuation under Eminent Domain* (1936), pp. 119–120. Here the court found that there were no other vessels on the Mississippi River like those seized, and petitioner does not specifically challenge the finding. Under it application of the rule excluding evidence of offers to buy was clearly proper. The cases cited by petitioner (Pet. 12–14) do not reject the rule; in each of them property like that being valued was being actively bought and sold. Moreover the question of admissibility turns in each case upon the particular showing there made, and plainly does not warrant review by this Court.

2. Petitioner also argues (Pet. 12–13) that if this Court accepts the Government's contention that the seizure of the vessels was tortious and not an eminent domain taking, petitioner then will be entitled to have the Standard Oil offer considered in fixing the value of the vessels, just as much as if the taking were by eminent domain. We do not, of course, dispute this proposition. The rules for valuing the property are the same whether the taking was tortious or by eminent domain. *United States* v. *New River Collieries Co.,* 262 U. S. 341, 344.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the petition should be denied.

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JULY 1940.

APPENDIX

Private Law, No. 69, of April 18, 1934, 73d Congress, 2d Sess. (c. 150, 48 Stat. 1322):

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That jurisdiction is hereby conferred upon the Court of Claims of the United States, whose duty it shall be, notwithstanding the lapse of time or the bar of any statute of limitations or previous court decisions, to hear, consider, and render judgment on the claims of Edward F. Goltra against the United States for just compensation to him for certain vessels and unloading apparatus taken, whether tortiously or not, on March 25, 1923, by the United States under orders of the Acting Secretary of War, for the use and benefit of the United States; and any other legal or equitable claims arising out of the transactions in connection therewith: *Provided,* That separate suits may be brought with respect to the vessels and the unloading apparatus, but no suit shall be brought after the expiration of one year from the effective date of this Act: *Provided further,* That either party may appeal as of right to the Supreme Court of the United States from any judgment in said case at any time within ninety days after the rendition thereof, and any judgment rendered in favor of the claimant shall be paid in the same manner as other judgments of said Court of Claims are paid.

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SUPREME COURT OF THE UNITED STATES.

Nos. 191, 192.—October Term, 1940.

191 — The United States, Appellant, *vs.* Kate B. Goltra and E. Field Goltra, Jr., Executors of the Estate of Edward F. Goltra, Deceased. — On Appeal from the Court of Claims.

192 — Kate B. Goltra and E. Field Goltra Jr., Executors of the Estate of Edward F. Goltra, Deceased, Appellants, *vs.* The United States. — On Cross Appeal from the Court of Claims.

[February 3, 1941.]

Mr. Justice Reed delivered the opinion of the Court.

The appeal brings here the correctness of the ruling by the Court of Claims which allows interest on a claim against the appellant, the United States. The cross appeal raises an issue that the compensation awarded is inadequate because the court failed to consider certain evidence as to the value for lease or use of the property involved.[1] The judgment was entered upon a petition filed under authority of a private jurisdictional act, quoted in the margin.[2]

This controversy had its inception on March 25, 1923. At that time Edward F. Goltra was the lessee of four tug boats and 19 steel

[1] Both parties also sought review by petition for certiorari because of this Court's decision in Colgate *v.* United States, 280 U. S. 43, and Assiniboine Indian Tribe *v.* United States, 292 U. S. 606. The inclusion of the phrase "as of right" in the jurisdictional act sufficiently makes clear the intention of Congress to authorize either party to take a technical appeal to this Court. Cf. House Report No. 828, 73rd Cong., 2nd Sess., p. 3.

[2] Act of April 18, 1934, 48 Stat. 1322, c. 150:

"Be it enacted . . . that jurisdiction is hereby conferred upon the Court of Claims of the United States, whose duty it shall be, notwithstanding the lapse of time or the bar of any statute of limitations or previous court decisions, to hear, consider, and render judgment on the claims of Edward F. Goltra against the United States for just compensation to him for certain vessels and unloading apparatus taken, whether tortiously or not, on March 25, 1923, by the United States under orders of the Acting Secretary of War, for the use and benefit of

barges belonging to the United States. While tied up for the winte on the Mississippi at the Port of St. Louis, they were repossessed because of an alleged breach of the lease, by Colonel Ashburn, Chie of the Inland and Coastwise Waterways Service, under orders from the Acting Secretary of War. Apparently some unloading facilitie were also seized. In several court proceedings to recover possessio Mr. Goltra was defeated.[3] It would be futile to examine as t whether these adjudications determined all or any controversies be tween the parties, since the jurisdictional act opened the doors o the Court, "notwithstanding the lapse of time or the bar of an statute of limitations or previous court decisions." Suing unde this special legislation Mr. Goltra[4] sought damages for the wrongfu taking of the fleet and facilities and recovered $350,000 with six pe cent interest from March 25, 1923, to the date of payment. Th Government assigns error only to the allowance of interest and th executors only to the refusal to consider certain proffered evidenc

By a contract of 1919, with a supplement of 1921, Mr. Goltr leased the fleet of river boats for governmentally supervised opera tion as common carriers on the Mississippi and its tributaries fro the Chief of Engineers as lessor. The lessor was acting for the Wa Department, the executive agency in charge of the boats. The ter of the lease was five years from the delivery of the first unit of th fleet, which occurred on July 15, 1922. All net earnings were s questered during the term for application upon the purchase of th fleet at cost or appraised value as detailed in the lease, with prov sion for subsequent installment payments over sixteen years. Se tion eight provided for termination by the lessor upon the lessee noncompliance "in his judgment with any of the terms and cond

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the United States; and any other legal or equitable claims arising out of t transactions in connection therewith: Provided, That separate suits may brought with respect to the vessels and the unloading apparatus, but no su shall be brought after the expiration of one year from the effective date of th Act: Provided further, That either party may appeal as of right to the Supre Court of the United States from any judgment in said case at any time with ninety days after the rendition thereof, and any judgment rendered in fav of the claimant shall be paid in the same manner as other judgments of sa Court of Claims are paid."

[3] Secretary of War *v.* Goltra, 7 F. (2d) 838; Ex parte United States, 2 U. S. 389; Goltra *v.* Secretary of War, 271 U. S. 536; Goltra *v.* Secretary War, 29 F. (2d) 257, cert. denied, 279 U. S. 843; Goltra *v.* Inland Waterwa Corp., 49 F. (2d) 497.

[4] On his death his executors were substituted.

tions" and for the return to the lessor of the plant, barges and towboats.

On March 4, 1921, the Secretary of War consented, in accordance with the lease, that Mr. Goltra's tariffs should be 80 per cent of the prevailing rail tariffs. This consent was withdrawn in May, 1922, before the delivery of the boats, and a consent limited to specific articles substituted. A control over the amount of grain to be carried was delegated to the Federal Manager of the Mississippi-Warrior River Service, a government corporation which operated a competing line. The enterprise got under way in the summer of 1922 and was immediately entangled in the ordinary vicissitudes of river transportation. The towboats had mechanical deficiencies; the open barges were not suitable for grain or other perishables; low water seriously interfered with navigation. After a few months towing by one tug, the fleet went into winter quarters late in the fall. Before business was resumed, Mr. Goltra was notified on March 4, 1923, by the Secretary of War that the lease was terminated and he was directed to turn over the towboats, barges and unloading facilities to Colonel Ashburn. Obedience to this order was refused and on March 25, 1923, Colonel Ashburn, under orders from the Acting Secretary of War, took possession of the fleet without the consent of Mr. Goltra or his employees, for the use and benefit of the United States.

The seizure was without the knowledge of the Chief of Engineers, who was the lessor empowered by its terms to terminate the lease, and that officer had not reached any conclusion to the effect that Mr. Goltra had in any manner failed in his obligations under the contract. Subsequently, in April, the Chief of Engineers terminated the lease pursuant to section eight. The action did not represent his judgment but was done under direction of his superior, the Secretary of War.

The Court of Claims fixed the damages as of the time of seizure, with interest to the date of payment "not as interest but as a part of just compensation."

Interest. By statute,[5] derived from the Act of March 3, 1863, no interest is allowed on any claim up to the time of the rendition of judgment by the Court of Claims. This accords with the traditional immunity of the Government from the burden of in-

[5] Judicial Code § 177.

terest unless it is specifically agreed upon by contract or imposed by legislation.[6] Without controverting this general rule, the executors find authority for the allowance of interest in the provision of the jurisdictional act for "just compensation . . . for certain vessels and unloading apparatus taken, whether tortiously or not . . . , for the use and benefit of the United States." Their argument is that the words "just compensation" have within themselves the same legal significance of interest on the award or damages from the date of the taking as has been given to these same words in the Fifth Amendment. They further urge that this interpretation is required by the phrase in the act "for the use and benefit of the United States" and the accepted finding that Colonel Ashburn's taking was for that purpose. In support of this position, the ruling of this Court in *Seaboard Air Line Railway Company* v. *United States*[7] and subsequent similar authority[8] is relied upon.

In the *Seaboard* case, section 10 of the Lever Act authorizing the taking by eminent domain of property for the public use on payment of just compensation was under examination. It contains no specific provision for interest. This Court held that a taking under the authority of section 10 required the just compensation "provided for by the Constitution" and that such compensation is payable "as of the time when the owners were deprived of their property."[9] This case, however, and the others cited in the preceding paragraph, involve the requisitioning or taking of property by eminent domain under authority of legislation. The distinction between property taken under authorization of Congress and property appropriated without such authority has long been recognized.[10] Acts of government officials in taking property without authorization of Congress confer no right

[6] 1 Op. Atty. Gen. 268, 550, 554; 3 *id.* 635; 4 *id.* 14, 136, 286; 7 *id.* 525; 9 *id.* 449; Tillson v. United States, 100 U. S. 43, 47; Angarica v. Bayard, 127 U. S. 251, 260; United States *v.* North Carolina, 136 U. S. 211, 216; National Volunteer Home *v.* Parrish, 229 U. S. 494, 496.

[7] 261 U. S. 299.

[8] Phelps *v.* United States, 274 U. S. 341; Jacobs *v.* United States, 290 U. S. 13; Liggett & Myers *v.* United States, 274 U. S. 215; Brooks Scanlon Corp. *v.* United States, 265 U. S. 106, 123.

[9] Cf. Danforth *v.* United States, 308 U. S. 271, 284-286.

[10] See United States *v.* North American Company, 253 U. S. 330, 333-334, the Seaboard case at pages 304 and 305, the Phelps case at pages 343 and 344, and the Jacobs case at page 18.

of recovery upon the injured citizen.[11] There are two instances of Congressional ratification of takings which turned tortious acts into the exercise of the power of eminent domain and placed upon the Government the duty to make "just compensation," including sums in the nature of interest. These are *United States* v. *Creek Nation*[12] and *Shoshone Tribe* v. *United States*.[13] In both cases there was a special jurisdictional act. In neither case was interest expressly allowed. In both this Court found Congressional confirmation of the previously unauthorized acts; in the *Creek* case, by disposition of the wrongfully acquired lands and failure to seek cancellation of the disposals after "full knowledge of the facts"[14] and in the *Shoshone* case by "the statutes already summarized, recognizing the Arapahoes equally with the Shoshones as occupants of the land, accepting their deeds of cession, assigning to the tribes equally the privilege of new allotments, and devoting to the two equally the award of future benefits."[15]

In the case now before us, however, there is neither the requisite Congressional authority before the taking nor any ratification or confirmation of the tort after the taking, which would justify a conclusion that the fleet was acquired by eminent domain. The jurisdictional act in itself is not an exercise of the power of eminent domain.[16] As the lease required action by the Chief of Engineers, the attempt to cancel it by the letter of the Secretary of War of March 3, 1923, and the order of the Acting Secretary of March 22, 1923, to take possession was unauthorized. The lower court found the taking tortious.[17] Nor can it be said that the continued possession and use by the United States indicated any confirmation or ratification of the tortious act, so as to bring this case within the rule of the *Creek* or *Shoshone* cases. A reading of the reports of the prior litigation[18] makes abundantly clear

11 Hooe *v.* United States, 218 U. S. 322, 333; United States *v.* Buffalo Pitts Co., 234 U. S. 228, 235.

12 295 U. S. 103.

13 299 U. S. 476.

14 295 U. S. at 110.

15 299 U. S. at 495.

16 Shoshone Tribe *v.* United States, 299 U. S. 476, 492.

17 Hawkins *v.* United States, 96 U. S. 689, 697; Plumley *v.* United States, 226 U. S. 545, 547; Yuhasz *v.* United States, 109 F. (2d) 467, 468; Burton Coal Co. *v.* United States, 60 Ct. Cls. 294, 312; Lutz Co. *v.* United States, 76 Ct. Cl. 405, 415.

18 See note 3 *supra*.

that the United States relied upon the termination of the lease by the Chief of Engineers which was practically contemporaneous with, though subsequent to, the taking, as their justification for possession of the fleet and property. This reliance found complete support in the various cited decisions of the courts, even though Mr. Goltra's petition for rehearing in this Court pointed out that the letter of the Chief of Engineers was written to justify the seizure.[19] Notwithstanding these definite judicial decisions upon the rights of the parties, Congress felt that Mr. Goltra may not have had fair treatment. It passed the present jurisdictional act and to that the executors are relegated to find authority to allow interest.

Such acts are to be strictly construed.[20] In the preceding paragraphs we have demonstrated that this unauthorized taking and judicially approved retention was in no sense an exercise of the power of eminent domain. We see no ground to read into this act of grace, which was apparently drawn to rectify what Congress felt might be a wrong, an authority to allow interest as a part of just compensation. If interest was to be allowed for so long a period upon an ordinary claim, and contrary to established governmental practice, Congress would have so declared.[21]

Evidence. The main issue raised by the appeal of Mr. Goltra's executors relates to the evidence. In its opinion the Court of Claims said:

"It is contended by the plaintiff that, in arriving at just compensation, an offer to rent the fleet made years after the fleet had been seized and the rental value of similar vessels on the Mississippi

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[19] Brief filed July 16, 1926, pp. 33-34: "The opinion violates the elementary common-law rule that a trespass cannot be justified by an act subsequent. It appears from the record that counsel for defendant caused this letter to be written for the sole purpose of justification of a prior trespass. It was not the act, therefore, of Major-General Beach for the purpose of canceling the contract, but the act of counsel for defendant to excuse the illegal act. We quote from the record: 'Mr. Hocker: I caused this letter to be executed and delivered to Mr. Goltra for the purpose of meeting that objection. The Court: You caused a letter to be written a month after the seizure to justify the seizure and an attempted cancellation which had already been had? Mr. Hocker: Yes, I did.' Certainly bad faith is shown here."

[20] Dubuque & Pacific R. R. *v.* Litchfield, 23 How. 66, 88; Slidell *v.* Grand Jean, 111 U. S. 412, 437-38; Coosaw Mining Co. *v.* South Carolina, 144 U. S. 550, 562; Blair *v.* Chicago, 201 U. S. 400, 471; Charles River Bridge *v.* Warren Bridge, 11 Pet. 420, 544; see Russell *v.* Sebastian, 233 U. S. 195, 205.

[21] Cf. Tillson *v.* United States, 100 U. S. 43, 46; Boston Sand Co. *v.* United States, 278 U. S. 41, 46.

River should be taken into consideration. These contentions cannot be sustained."

Assuming that these items of evidence were competent, we cannot say that the Court of Claims, making a jury award, was bound to give them weight. The actual damages suffered by Mr. Goltra were highly speculative, especially since the contract was subject to lawful cancellation whenever the Chief of Engineers rightly or wrongly but in good faith determined that Mr. Goltra was violating its provisions. Mr. Goltra's operation under the lease had been a losing venture. Under these circumstances, the Court of Claims may have believed that an offer to purchase, made in May, 1925, was too remote to influence its judgment and that the rental value of other vessels on the Mississippi, not subject to the same restrictions as those taken by the Government, was too unreliable to afford a useful comparison. It was for the Court of Claims to decide what weight such facts deserved, and we construe its opinion only as holding that under the circumstances of this case the evidence was not considered to be of any assistance in reaching a conclusion.

Mr. Goltra's executors also complain of the failure of the Court of Claims to make certain findings, but there is no indication that the Court of Claims did not consider the facts which were embodied in the proposed findings.

The judgment in No. 191 is modified as indicated in the opinion and, as modified, affirmed; the judgment in No. 192 is affirmed.

The CHIEF Justice and Mr. Justice BLACK took no part in the consideration and decision of these appeals.

A true copy.

Test:

Clerk, Supreme Court, U. S.

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